Supreme Court, U.S.
FILED

061164 FEB 26 2007

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No.

IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The statute of limitations in the Tucker Act, 28 U.S.C. §2501, provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The questions presented are:

1. Whether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the Court of Federal Claims.

2. Whether a claim for a permanent physical taking of a portion of real property first accrues upon the government's temporary exclusion of the property holder from another portion of the property.

RULE 29.6

Petitioner has no parent company. No publicly held company owns 10% or more of petitioner's stock.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 457 F.3d 1345 and is reprinted in the Appendix. App. 1a-40a, 157a. The opinion of the Court of Federal Claims after trial is reported at 62 Fed. Cl. 556 and is reprinted in the Appendix. App. 41a-126a. The opinion of the Court of Federal Claims denying in part the government's motion for judgment on the pleadings is reported at 57 Fed. Cl. 182 and is reprinted in the Appendix. App. 127a-154a.

JURISDICTION

The court of appeals' judgment was entered on August 9, 2006. Petitioner's timely petition for rehearing was denied on November 30, 2006. App. 155a-156a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The Tucker Act provides in relevant part:

> "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or

any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §1491(a)(1).

"Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. §2501.

STATEMENT

This case raises the important, unsettled and recurring question of whether older decisions of this Court holding that the Tucker Act's statute of limitations is jurisdictional remain good law in light of this Court's recent cases holding that statutes of limitation generally do not affect subject matter jurisdiction in the absence of a clear Congressional statement. This question has plagued the Federal Circuit for more than twenty years. This case also raises the important and unsettled question of whether a claim for a permanent taking of a portion of real property first accrues from the date of the government's earlier temporary invasion of another portion of the property.

I. Statement of Facts.

The Federal Circuit found to be undisputed the pertinent facts set forth in the Court of Federal Claim's decision on the government's motion for judgment on the pleadings, 57 Fed. Cl. 182 (App. 127a-155a), and

decision after trial, 62 Fed. Cl. 556 (App. 41a-126a). App. 2a, 15a.

A. John R. Sand's Leasehold.

Petitioner John R. Sand & Gravel Company ("John R. Sand") leased 158 acres in Metamora Township, Lapeer County, Michigan, in 1969 for a term of 50 years. App. 128a. The lease entitles John R. Sand to exclusive use of the property for mining and removing marketable stone and sand. App. 53a. John R. Sand's sand and gravel production facilities, including buildings, a crushing and wash plant, and a water supply well and pond (the "Plant Area"), are located in the center of its rectangular leasehold. A contaminated landfill known as the Metamora Landfill is located in the northern portion of the leasehold. App. 128a. John R. Sand's Plant Area is not in the landfill area. See figure attached to the Federal Circuit's decision ("February 1994 Fence Alignment"), App. 157a.

B. EPA's Early Activities.

In 1984, the United States Environmental Protection Agency ("EPA") placed the landfill on its National Priority List of hazardous waste sites pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* ("CERCLA"). App. 128a. In 1986, EPA issued a record of decision ("ROD") setting forth remedial action plans concerning portions of the landfill. App. 128a. By 1989, EPA had installed monitoring wells in the landfill area. App. 128a. In 1990, EPA issued a second ROD that called for a cap over the

landfill and other actions. The 1990 ROD did not describe the metes and bounds of the landfill cap, did not indicate when construction of the cap would begin, and did not exclude John R. Sand from any portion of its leasehold. App. 129a.

C. Early EPA Fences.

EPA erected fences in John R. Sand's Plant Area in 1992-1993 that temporarily prevented John R. Sand from operating its machinery and selling finished products to customers. App. 129a. Following John R. Sand's protests, EPA relocated the fences outside the Plant Area and John R. Sand continued its mining and gravel operations. App. 130a. In February 1994, EPA installed another fence in the Plant Area that temporarily deprived John R. Sand of access to its water supply well next to its supply pond, but EPA removed this fence in the summer of 1994 and John R. Sand continuously used the area thereafter. App. 130a. The 1994 fence alignment is shown on the February 1994 Fence Alignment, App. 157a.

D. Administrative Order.

On December 18, 1996, EPA issued an Administrative Order to John R. Sand that required John R. Sand to provide entry and access to EPA and its representatives to all portions of John R. Sand's leasehold. EPA asserted that access was necessary to complete remedial actions for the landfill pursuant to a 1993 consent decree between EPA and a group of defendants ("Settling Defendants"). App. 130a-131a, 153a n. 6. The Administrative Order defined by metes and bounds an "Area of Institutional Controls"

containing the landfill cap system. The landfill cap system consists of a cap extending to the edge of the waste, a stormwater retention pond not within the cap, a security fence, a landfill gas venting system, and implementation of deed restrictions. The Area of Institutional Controls is the cross-hatched area shown on Exhibit C to the Administrative Order, Joint Trial Exhibit 45. App 158a. The Area of Institutional Controls includes an area larger than the landfill cap and its boundary was not fenced in 1994. App. 157a.

Following disputes between John R. Sand and EPA concerning EPA's access to the landfill site, the District Court for the Eastern District of Michigan issued an order granting the government and its representatives access to the landfill site and authorizing relocation of the perimeter fence. App. 119a n.7, App. 132a. The fence, begun on April 27 and completed on May 12, 1998, enclosed about 42 acres of John R. Sand's leasehold and completely excluded John R. Sand only from the Area of Institutional Controls. App. 132a.

John R. Sand filed its complaint for a permanent physical taking of the portion of its leasehold enclosed within the Area of Institutional Controls on May 20, 2002. App. 132a.

II. Proceedings in the Court of Federal Claims: Motion for Judgment on the Pleadings.

The government moved for judgment on the pleadings (which the Court of Federal Claims treated as a motion for summary judgment because the parties included materials outside the pleadings), arguing that the Tucker Act's six-year statute of limitations barred John R. Sand's claim. App. 132a, 134a. The

government argued that EPA's activities since 1992, including occupation, removal of hazardous materials, and installation of wells and original fencing, were the events that fixed the government's liability. App. 135a.

Except as to the monitoring wells, the court found that the government did not demonstrate that John R. Sand's property was "clearly and permanently" taken in 1992 to cause a physical taking. App. 141a. The court found that the government failed to demonstrate that it destroyed John R. Sand's right to posses, use or dispose of its property within the rule for a permanent physical taking set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), in the Area of Institutional Controls by constructing the 1992-1993 fences. App. 142a. The court found that John R. Sand had the right to possess and in fact made extensive and valuable use of the portion of its leasehold that later became the Area of Institutional Controls by mining the area until EPA issued the December 1996 administrative order. App. 142a. As to the monitoring wells, the court found that John R. Sand's claim as to the area occupied by the wells was barred, but the extent of the taking for the individual wells did not "bootstrap" to become a permanent physical taking of the entire Area of Institutional Controls. App. 143a. The court did not decide exactly when John R. Sand's claim first accrued, whether December 1996 or May 1998. App. 150a.

III. Proceedings in the Court of Federal Claims: Trial.

After trial on liability, the Court of Federal Claims determined, among other things, the accrual date of John R. Sand's claim. App. 50a-52a. The court

noted that John R. Sand and the government agreed that John R. Sand's claim accrued in May 1998. The court found as a matter of law that John R. Sand's taking claim accrued in May 1998 when the government's agents completed the fence that "permanently and absolutely excluded" John R. Sand from the Area of Institutional Controls, citing the parties' stipulated facts. App. 52a.

On the merits, the court held that John R. Sand's physical taking claim was non-compensable under equitable principles of "justice and fairness" set forth in regulatory takings cases, in part because John R. Sand allowed the continuation of landfilling activities on its leasehold after its lease began in 1969. App. 72a-73a. The court further held that a 1995 Michigan statute, enacted 26 years after John R. Sand's valid 1969 lease, operated as a background principle of nuisance law pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). App. 81a. Noting that no Michigan case supported the result, the court held that the government could abate John R. Sand's continued mining in the Area of Institutional Controls as an anticipatory nuisance by permanent physical occupation of the Area of Institutional Controls. App. 111a-112a.[1]

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[1] The Court of Federal Claims decision after trial is arguably contrary to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." (footnote omitted)), and *Lucas*, 505 U.S. at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."). The Federal Circuit did not address the trial court's

IV. Proceedings in the Federal Circuit.

In a split decision, the Federal Circuit vacated and remanded for dismissal, but did not address the merits. Over a vigorous dissent, the panel majority held 28 U.S.C. §2501 to be jurisdictional, determined that the government's construction of the 1994 fence caused John R. Sand's permanent physical taking claim to first accrue, and held that John R. Sand's complaint filed in 2002 was time-barred.

The panel majority would not have addressed the accrual of John R. Sand's claim but for the majority's view that the statute of limitations is jurisdictional and can be addressed *sua sponte* by the court.[2] The government did not appeal the Court of Federal Claims' rejection of the government's argument that the statute of limitations barred John R. Sand's claim. App. 13a. The government agreed with John R. Sand that John R. Sand's taking claim accrued upon construction of the fence around the Area of Institutional Controls in May 1998, and therefore 28 U.S.C. §2501 did not bar John R. Sand's claim. App. 14a. The panel majority addressed the jurisdictional issue at the invitation of an amicus, the Metamora Group (the Settling Defendants who signed the consent decree with EPA). App. 13a-14a, 31a n. 9.

The panel majority recognized that this Court's recent jurisprudence, beginning with *Kontrick v. Ryan*, 540 U.S. 443 (2004), considers statutes of limitations

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decision on the merits, App. 28a, and the merits are not the subject of this petition.

[2] Every federal appellate court must satisfy itself of its own jurisdiction and that of the lower courts in a claim under review. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See App. 15a. This principle is not at issue in this petition.

and other "claim-processing" rules as non-jurisdictional, but distinguished §2501:

> [S]ection 2501 sets forth a condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States. We have continued to hold that section 2501 creates a jurisdictional prerequisite even after the Supreme Court decided *Kontrick* and its progeny.

App. 18a. The panel majority concluded:

> We recognize the Supreme Court's recent jurisprudence concerning claim-processing rules, but do not think that section 2501 falls within that category. Therefore, we are unwilling to disturb the well-settled law that section 2501 creates a jurisdictional condition precedent for suit in the Court of Federal Claims, which may not be waived by the parties.

App. 19a.

The panel majority further held that John R. Sand's claim for a permanent physical taking accrued upon construction of the February 1994 fence because "EPA's presence destroyed JRS&G's right to exclude others." App. 24a.

The dissent argued that this Court's recent statute of limitations jurisprudence applies to §2501 and that "it is incorrect to accord unique status to §2501 and hold that it is a limit on 'jurisdiction'." App. 34a-36a. As to the panel majority's "permanence" analysis, the dissent argued that the majority's position "brings serious imprecision to takings law." The dissent argued

that John R. Sand's claim for a permanent taking of the Area of Institutional Controls should not have accrued based on construction of fences in a separate area of the leasehold and when the fences were later removed, restoring the area to use by John R. Sand. App. 39a.

The Federal Circuit denied John R. Sand's petition for rehearing *en banc* on November 30, 2006. App. 155a-156a.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted to clarify the important, unsettled and continuing issues of (1) whether the Tucker Act's statute of limitations constitutes a clear Congressional statement of a limit on the subject matter jurisdiction of the Court of Federal Claims, and (2) whether a claim for a permanent physical taking of a portion of real property first accrues upon the government's temporary exclusion of the property owner from another portion of the property.

The jurisdictional issue is important because it applies to all claimants against the government, including taking claimants such as John R. Sand. This issue requires resolution by this Court to settle whether this Court's recent statute of limitations cases overrule this Court's older cases that hold the Tucker Act's statute of limitations to be jurisdictional. The issue is continuing because not only has it divided decisions in the Federal Circuit for twenty years, but it has produced contradictory decisions in the Court of Federal Claims.

The test for when a permanent taking first accrues is important because the Federal Circuit's decision injects significant ambiguity into the test for

determining when a permanent taking first accrues. The test adopted by the Federal Circuit would allow the government to argue that a taking claim is barred based upon government conduct on any portion of property that occurred years or decades in the past. Such a test would cause needless litigation and disputes about claim accrual matters that are typically obvious.

I. The Federal Circuit Exempted the Tucker Act From This Court's Recent Statute of Limitations Jurisprudence.

A. The Federal Circuit's Decision Identifies a Conflict Between Older and More Recent Decisions of This Court.

In holding that the six-year statute of limitations in the Tucker Act, 28 U.S.C. §2501, is jurisdictional, the Federal Circuit panel majority expressly relied on this Court's 19th-century cases beginning with *Kendall v. United States*, 107 U.S. 123 (1883). In *Kendall*, this Court said:

> We said in *McElrath v. United States*, 102 U.S. 426, that the government could not be sued except with its consent, and that it may restrict the jurisdiction of the Court of Claims to certain classes of demands. . . . To that class may be referred claims which are declared barred if not asserted within the time limited by the statute.

107 U.S. at 123. The panel majority cited (App. 19a) several other 19th-century cases to support its view, including *Finn v. United States*, 123 U.S. 227, 232-233

(1887) ("The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the court of claims against the United States."), *DeArnaud v. United States*, 151 U.S. 483, 495-496 (1894) (same, quoting *Finn*), *United States v. New York*, 160 U.S. 598, 616-619 (1896) (dicta, quoting *Finn*), and *United States v. Wardwell*, 172 U.S. 48, 52 (1898) ("Section 1069, Rev. St., is not merely a statute of limitations, but also jurisdictional in its nature, and limiting the cases of which the court of claims can take cognizance" citing *Finn*).

In *Soriano v. United States*, 352 U.S. 270, 271 (1957), this Court relied on *Kendall* to hold that the Court of Claims lacked jurisdiction over a claim not filed within the Tucker Act's six-year limitations period. The basis for the holding in *Soriano* was the doctrine that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Id.* at 276, citing *United States v. Sherwood*, 312 U.S. 584, 590-91 (1941).

This strict application of the "limitations and conditions" of a waiver of sovereign immunity was loosened in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), in which this Court recognized that limitations principles should generally apply to the government "in the same way" they apply to private parties. It is arguable, but not settled, that *Irwin* overruled *Soriano*. See *Irwin*, 498 U.S. at 98-99 (White, J., concurring); dissent below, App. 36a. This strict application of the doctrine of conditions on waivers of sovereign immunity was further loosened in *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002)

("the text of §2501 is unexceptional" and does not create a special accrual rule in suits against the government).

Yet the Federal Circuit panel majority did not discuss the application of either *Irwin* or *Franconia Associates* to the jurisdictional nature of §2501. App. 34a-35a. Under *Irwin*, the question implicated by the Federal Circuit's decision is whether construing §2501 as non-jurisdictional "amounts to little, if any, broadening of the congressional waiver" and "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." 498 U.S. at 95.

B. The Federal Circuit's Decision Conflicts with Claim-Processing Decisions of This Court.

The Federal Circuit panel majority rejected as inapplicable to §2501 this Court's recent claim-processing cases because the panel majority did not "think that section 2501 falls within that category." App. 19a. As argued by the dissent, App. 37a-38a, the panel majority's reasoning conflicts with this Court's concerted effort to clarify the relation between statutes of limitation and subject matter jurisdiction beginning with *Kontrick v. Ryan*, 540 U.S. 443 (2004):

> Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

* * *

> Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the party's litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.

540 U.S. at 455, 456.

Kontrick's admonition was repeated in *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (Equal Access to Justice Act fee-processing procedure is not "jurisdictional"); see also *id.* at 421 (applying *Irwin* and *Franconia*[3]), and *Eberhart v. United States*, 546 U.S. 12, ___ (Oct. 31, 2005) (slip op. at 4) ("our most recent decisions have attempted to brush away confusion" concerning non-jurisdictional claim-processing rules).

This Court has cautioned against "profligate" use of the term "jurisdiction" and that "time prescriptions, however emphatic, 'are not properly typed jurisdictional'". *Arbaugh v. Y & H Corp.*, 546 U.S. 500, ___ (Feb. 22, 2006) (slip op. at 8) (Title VII definition of "employer" not jurisdictional, but relates to the merits). Most recently, this Court has stated that a "statute of limitations defense . . . is not

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[3] Even if the modest broadening of the waiver of sovereign immunity in *Irwin* is limited to a "readily identifiable private-litigation equivalent," see *Scarborough*, 541 U.S. at 427 (Thomas, J., dissenting), takings claims for damages are equivalent to private actions for damages resulting from trespass to real property. See Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1197 (1950).

'jurisdictional'". *Day v. McDonough*, 547 U.S. ___, ___ (Apr. 25, 2006) (slip op. at 5) (construing one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2244(d)); see also Scalia, J., dissenting ("We have repeatedly stated that the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are non-jurisdictional and thus subject to waiver and forfeiture", citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), *Eberhart* and *Kontrick*) (dissent slip op. at 2-3).

C. The Federal Circuit's Decision Continues Intra-Circuit Conflict Over Whether §2501 is Jurisdictional.

For twenty years, the Federal Circuit has steered an unsteady course over the jurisdictional nature of §2501. This Court should resolve this intra-circuit conflict because the Federal Circuit is the only circuit that will address this issue. This conflict now manifests itself in contradictory decisions in the Court of Federal Claims that thwart uniform treatment of Tucker Act claimants.

By not evaluating the effect of *Irwin* and *Franconia Associates* on *Soriano*, the Federal Circuit's decision conflicts with prior decisions of the Federal Circuit. *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352-1353 (Fed. Cir. 2000)(*Irwin* overruled *Soriano*); *Wood-Ivey Systems Corp. v. United States*, 4 F.3d 961, 964 n.4 (Fed. Cir. 1993("The Supreme Court considers [*Soriano*] to be obsolete if not overturned"); see also Plager, J., concurring ("Since *Irwin*, compliance with statutory time limits is no longer jurisdictional, in

the old sense that when a Congressionally specified time limit had expired a court had no power to entertain the case."). 4 F.3d at 964 n.3.

The Federal Circuit has long struggled with the "jurisdictional" nature of §2501. The struggle began with *Bray v. United States*, 785 F.2d 989, 992 (Fed. Cir. 1986) ("over the years, the term 'jurisdiction' has been batted about like a bird caught in a badminton game"; subject matter jurisdiction distinguished from the exercise of such jurisdiction). Next, the case upon which the panel majority relies, *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988), relied on *Soriano* to find that §2501 is a jurisdictional limitation rather than an affirmative defense. See App. 16a, 35a-36a (dissent). A later decision of the Federal Circuit noted the confusion in this area. *Henke v. United States*, 60 F.3d 795, 998-999 (Fed. Cir. 1995) ("[T]he Government neglects to point out that the question of statutory time bars and sovereign immunity is no longer amenable to bright-line rules and that the historic role of strict construction of sovereign immunity has been thrown into considerable question by recent Supreme Court decisions", citing *United States v. Locke*, 471 U.S. 84 (1985)[4] and *Irwin*. See also *Ariadne Financial Services Party, Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("as a threshold matter, this statutory language [in §2501] confirms that the question of a time

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[4] "Statutory filing deadlines are generally subject to the defenses of waiver, estoppel and equitable tolling. Whether this general principle applies to deadlines that run in favor of the Government is a question on which we express no opinion today." 471 U.S. at 94 n. 10 (citation omitted).

bar on Ariadne's claim does not affect the subject matter jurisdiction of the Court of Federal Claims").

The panel majority relies on an *en banc* decision of the Federal Circuit, *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003), which cited the "well established" rule that statutes of limitations for claims against the government are jurisdictional in nature. *Id.* at 1316. The court, however, noted that exceptions to limitations periods, such as equitable tolling, turn on Congressional intent, citing *Irwin*. *Id.* That view is consistent with *Arbaugh*, slip op. at 14, ("But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character."). *Martinez* seems not to have bound later panels of the Federal Circuit. See *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n. 2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here therefore would seem to be that Venture Coal failed to make its claim within the required limitations period – that is not a question of subject matter jurisdiction of the court.").

D. The Federal Circuit's Decision Conflicts in Principle With Decisions From Other Circuits.

The Federal Circuit panel majority's cramped view of §2501 in light of *Irwin* conflicts in principle with the holdings of all but one of the other circuits. Eleven out of 12 other circuits have construed *Irwin* to mean that compliance with a statute of limitations generally is not a jurisdictional prerequisite to suing the government in the absence of a clear Congressional statement. See *Oropallo v. United States*, 994 F.2d 25,

29 n.4 (1st Cir. 1993) (recognizing that *Irwin* "overruled or made irrelevant" *Soriano*); *Boos v. Runyon*, 201 F.3d 178, 183 (2d Cir. 2000) (temporal prerequisites to suit are not jurisdictional); *Hedges v. United States*, 404 F.3d 744, 749 (3d Cir. 2005) (*Irwin* holds that mandatory language of §2501 is subject to equitable tolling and therefore not jurisdictional); *Laber v. Harvey*, 438 F.3d 404, 429 (4th Cir. 2006) (time limits subject to equitable tolling are not jurisdictional); *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995) (*Irwin* "overturned the established precedent of many circuits" that statutory time limits in suits against the government are jurisdictional); *Glarner v. United States*, 30 F.3d 697, 701 (6th Cir. 1994) (Federal Tort Claims Act statute of limitations is not jurisdictional); *Frey v. Environmental Protection Agency*, 270 F.3d 1129, 1135 (7th Cir. 2001) ("failure to comply with statutory limits on a waiver of sovereign immunity is not jurisdictional"); *Fadem v. United States*, 52 F.3d 202, 206 (9th Cir. 1995) (*Irwin* held that "statutory time limits on suits against the government are *not* jurisdictional in nature" (emphasis in original)); *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002) (*Irwin* construed "unequivocally mandatory language" of §2501 as subject to equitable tolling and therefore not jurisdictional); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) ("garden-variety statute of limitations" is not jurisdictional); *Chung v. United States Dep't of Justice*, 333 F.3d 273, 277-78 (D.C. Cir. 2003) (an "ordinary statute of limitations" is not jurisdictional). Only the Eighth Circuit holds that *Irwin* does not announce a general rule that a statute of limitations is not jurisdictional. *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006) ("the statute of

limitations" in the Federal Tort Claims Act "defines the court's jurisdiction").

E. The Jurisdictional Question Concerning §2501 Has Caused Continuing Conflict in the Court of Federal Claims.

The intra-circuit conflict and confusion in the Federal Circuit concerning the jurisdictional nature of §2501 has caused the Court of Federal Claims to diverge in opposite directions. Two Court of Federal Claims decisions issued on the same day two weeks before the Federal Circuit's decision below illustrate this divergence. In *Kosmo v. United States*, 72 Fed. Cl. 46 (2006), the court held that §2501 is jurisdictional. In *Bolduc v. United States*, 72 Fed. Cl. 187 (2006), the court exhaustively explored the issue and determined that the better-reasoned authority holds that §2501 is not jurisdictional.

In *Bolduc*, the court considered the practical effect of the jurisdictional question: "The label under which a dismissal motion is considered can be significant to the outcome of that motion – as plaintiffs have the burden of demonstrating subject-matter jurisdiction while the defendant has the burden where a motion for failure to state a claim is filed." *Id.* at 192 (citations and internal quotations omitted). *Bolduc* relied on *Grass Valley Terrace v. United States*, 69 Fed. Cl. 341, 345-49 (2005) (on remand from this Court's decision in *Franconia Associates*), which reconciled the Federal Circuit's "inconsistent" decisions to conclude that the Federal Circuit decisions that have "closely examined" the issue support a plain-language interpretation that §2501 is not jurisdictional. Most

recently, the Court of Federal Claims found the reasoning in *Grass Valley Terrace* "compelling" but, believing itself bound by the Federal Circuit's decision below, found that §2501 is jurisdictional. *Chaney v. United States*, ___ Fed. Cl. ___, ___ (2007 U.S. Claims Lexis 23, *14 n.7 (slip op. at 6 n.7) (Feb. 2, 2007).

II. The Federal Circuit's Decision Causes "Serious Imprecision" in Takings Law.

The Federal Circuit's decision establishes a peculiar rule, unsupported by this Court's decisions, that a property owner's claim for a permanent physical taking "first accrues" when the government places (but later removes) a substantial structure (a fence) on one portion of private property that is different from another portion of the property that the government later permanently occupies. As noted by the dissent below, the "serious imprecision" of this peculiar rule threatens to throw into disarray what should be a straightforward analysis of physical takings claims.

A. The Federal Circuit's Decision Blurs the Straightforward Notion of Permanent Physical Taking.

It has been settled since *Loretto* that a permanent physical occupation of real property constitutes a taking whereas a temporary physical invasion is not a taking. Physical occupations are distinguishable from "temporary limitations on the right to exclude" by their "permanence and absolute exclusivity." 458 U.S. at 436 n.12.

After *Loretto*, this Court has not had occasion to address the "permanent" and "occupation" elements of

Loretto, except to note that the fact of a physical taking is "typically obvious and undisputed." *Tahoe-Sierra*, 535 U.S. at 322 n.17. Yet, the Federal Circuit panel majority held that "'permanent' has a special meaning in the determination of whether a physical occupation has occurred." App. 22a. The "special meaning" of permanence adopted by the Federal Circuit results in a rule that government "presence", App. 26a, on any portion of property causes a taking claim to accrue for permanent government occupation of any other portion of the property.

The Federal Circuit's unusual formulation of "permanence" results from its misapplication of several Federal Circuit decisions that, without guidance from this Court, have blurred the notion of permanent occupation. First, in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), the court, in evaluating the permanence of 100-foot deep, concrete-encased steel groundwater monitoring wells, said: "When the government intrusion is as substantial a physical occupancy of private property as this is, *Loretto* establishes that there is a taking." *Id.* at 1377. The Federal Circuit panel majority misquoted this language in *Hendler* to hold that government occupation is permanent when the government's "intrusion is a substantial physical occupancy of private property." App. 22a. This misquotation significantly misconstrues *Hendler*.

A later decision of the Federal Circuit, construing *Hendler*, determined that a permanent physical occupation involves a "substantial physical interference with property rights." *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993), cited by the panel majority, App. 22a. The panel majority then inflates the government's "presence" by

virtue of the fences erected in 1994 in John R. Sand's Plant Area as destroying John R. Sand's "right to exclude others from its leasehold." App. 24a. This "presence of a permanent nature", the panel majority reasoned, caused John R. Sand's permanent taking claim to accrue in 1994. App. 26a.

The Federal Circuit's analysis overlooks several key facts found by the Court of Federal Claims, and not found clearly erroneous by the Federal Circuit, that are consistent with a "typically obvious" permanent occupation. See dissent, App. 39a-40a. First, the February 1994 fence was in John R. Sand's Plant Area, and did not enclose the Area of Institutional Controls that the government agreed at trial was permanently taken in 1998. App. 130a. Second, EPA removed this fence in the summer of 1994. Third, as the government stipulated, the government "permanently and exclusively occupied the Area of Institutional Controls in May 1998." App. 51a-52a.

B. The "Springing" Accrual Rule of the Federal Circuit Will Distort the Accrual Test in §2501.

The rule gleaned from the Federal Circuit's decision appears to be that if the government installs objects on some "portion" of private property, App. 24a, the property owner's taking claim accrues for the government's later permanent occupation of *any other* portion of the property. The Federal Circuit's test will allow the government to argue that its occupation of one portion of property "springs" to any other portion of the property whenever the government finds it useful to raise the statute of limitations.

The proposed "springing" rule threatens to collapse distinctions between temporary and permanent takings. Temporary takings are analyzed where the government's occupation is for a limited time. *United States v. Pewee Coal Co.*, 341 U.S. 114, 119 (1951) (Reed, J., concurring: "Many properties . . . may be subjected to public operation only for a short period of time to meet war or emergency needs, and can then be returned to their owners."). Yet the return of property to the property owner is inconsistent with the elements of a permanent taking: the government deprives the property owner of the rights to possess, use and dispose of the property. *Loretto*, 458 U.S. at 435-436.

The Federal Circuit's proposed "springing" accrual rule threatens to create a special accrual rule under §2501. Property holders would now have to bring a defensive claim for a permanent taking based upon government invasion of the property, no matter how transient the invasion, for fear that a claim for any later permanent occupation by the government would be time-barred. This Court rejected the effect of such a special accrual rule for §2501 in *Franconia Associates*, 536 U.S. at 147 ("The Government would thus find itself defending against highly speculative damage claims in a profusion of lawsuits").

CONCLUSION

The petition for certiorari should be granted.

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05-5033

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN R. SAND & GRAVEL COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

August 9, 2006, Decided

COUNSEL: Jeffrey K. Haynes, Beier Howlett, P.C., of Bloomfield Hills, Michigan, argued for plaintiff-appellant. With him on the brief was L. Rider Brice, III.

Aaron P. Avila, Attorney, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Kelly A. Johnson, Acting Assistant Attorney General; and Susan V. Cook,John S. Most, Steven D. Bryant, and Kathryn E. Kovacs, Attorneys.

Steven C. Nadeau, Honigman Miller Schwartz and Cohn LLP, of Detroit, Michigan, for amici curiae Brunswick Corporation, et al. With him on the brief were Robert M. Jackson; and Robert K. Huffman, Miller & Chevalier Chartered, of Washington, DC.

JUDGES: Before NEWMAN, LOURIE, and SCHALL, Circuit Judges. Opinion for the court filed by Circuit Judge SCHALL. Dissenting opinion filed by Circuit Judge NEWMAN.

SCHALL, Circuit Judge.

John R. Sand and Gravel Company ("JRS&G") appeals the final decision of the United States Court of Federal Claims, following a trial, that the United States was not liable to JRS&G under the Fifth Amendment to the Constitution for the alleged taking of JRS&G's leasehold interest in a 158-acre tract of land in Lapeer County, Michigan. *John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556 (2004) ("*Sand & Gravel III*"). Because we conclude that JRS&G did not file its complaint within the six-year limitations period of 28 U.S.C. § 2501, we hold that the Court of Federal Claims lacked jurisdiction. We therefore vacate the Court of Federal Claims's decision and remand the case to the court with the instruction that it dismiss JRS&G's complaint.

BACKGROUND

I.

The pertinent facts, which are not in dispute, are set forth in *John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182 (2003) ("*Sand & Gravel I*"), and *Sand & Gravel III*, 62 Fed. Cl. 556.

In 1969, JRS&G leased a 158-acre tract of land in Metamora Township, Lapeer County, Michigan, from Russell and Mildred Parrish ("Parrish property") for a

term of fifty years. *Sand & Gravel III*, 62 Fed. Cl. at 558. Pursuant to the lease, JRS&G is entitled to the exclusive use of the property for the purpose of mining sand and gravel. *Id.* at 564.[1]

The Parrish property consists of a rectangular area. *Sand & Gravel I*, 57 Fed. Cl. at 183 n.3. JRS&G's operations are principally located in its plant area in the east-central portion of the property. JRS&G's plant area contains several buildings, a supply pond, and customer access roads. *Id.* JRS&G's main sand and gravel pit ("main pit") is just southeast of the plant area. *Id.* A landfill is located to the north of JRS&G's plant area. *Id.* The landfill is known as the Metamora Landfill. The features just described, as well as others, are shown on the map of the Parrish property that is titled "February 1994 Fence Alignment Metamora Landfill Site." The map is included with this opinion as Appendix A.

The Area of Institutional Controls ("AIC") comprises a 42-acre portion of the property to the north of JRS&G's plant area. It encompasses the entirety of the landfill and some of the property surrounding the landfill wherein the landfill cap system is located.[2] *Id.* at 185. The northern and eastern boundaries of the AIC run along the Parrish property lines. To the west, the AIC boundary runs just outside the edge of a gravel road. To the south, the AIC is located to the north of JRS&G's siltation pond. The southern border of the AIC then cuts to the south to encompass the Stormwater Retention Pond.

At the time JRS&G signed the lease in 1969, the landfill was already operating on the northern portion of the

Parrish property. *Sand & Gravel III*, 62 Fed. Cl. at 560. The Parrishes continued to operate the landfill during the first eleven years of JRS&G's leasehold until it closed in 1980. *Id.* at 559-60. During its years of operation, the landfill illegally accepted solid and liquid industrial waste in 55-gallon drums. Tens of thousands of such drums are currently buried on the site. *Id.* at 570.

In 1984, the landfill was placed on the National Priorities List pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (2000), due to the large number of drums containing hazardous waste that had been buried there. See *Sand & Gravel III*, 62 Fed. Cl. at 559. Pursuant to CERCLA, the Environmental Protection Agency ("EPA") issued its first Record of Decision ("ROD") in 1986.[3] *Sand & Gravel I*, 57 Fed. Cl. at 183. In the 1986 ROD, the EPA stated that remedial action for the Metamora Landfill would consist of excavating the buried drums of hazardous waste for incineration off-site. The ROD estimated that the excavation would take six to eight months to complete. Pursuant to the 1986 ROD, the EPA not only excavated drums, but also took soil samples, installed groundwater monitoring wells, and constructed a storage pad[4] east of JRS&G's plant area. *Id.*

In 1990, the EPA issued a second ROD. *Sand & Gravel III*, 62 Fed. Cl. at 559. In the 1990 ROD, the EPA stipulated additional remedies selected for the containment of the Metamora Landfill and for treatment of the groundwater at the site. *Id.* at 559-60. These remedies included installing a landfill cap system

to prevent further contamination of aquifers by the wastes dumped in the Metamora Landfill and a fence around the landfill to restrict access to the site. *Id.* at 560. The 1990 ROD also contemplated the continued incineration of excavated drums off-site under the 1986 ROD. The 1990 ROD did not provide a metes and bounds description of the landfill cap and fence or indicate when construction would begin. *Sand & Gravel I*, 57 Fed. Cl. 182 at 183.

Pursuant to the the 1990 ROD, the EPA erected a chain link fence on JRS&G's leasehold during the winter of 1992-1993. *Id.* at 184. The fence enclosed approximately 60% of the Parrish property, including the entirety of the present AIC, JRS&G's plant area, and JRS&G's main pit. *Id.* at 184 & n.5. The fence was six feet tall and anchored by posts set 48 inches into the ground. Concrete secured the terminal, corner, and gate posts. The fence was topped with three strands of barbed wire and accompanied by EPA warning and no trespassing signs.

The fence prevented JRS&G from accessing its operations, prompting protests from the company. *Id.* Following these protests, the EPA allowed JRS&G to access its plant area and relocated the fence. *Id.* The record reveals that the relocated fence still encompassed the AIC.

In February of 1994, the EPA constructed a new internal security fence that cut off JRS&G's access to parts of its plant area. *Id.* at 184. The area that was fenced off as of February of 1994 is designated on the map at Appendix A as February 1994 Fence Alignment. As can be seen, as of February of 1994,

fencing encompassed the overwhelming portion of JRS&G's leasehold interest.[5] The internal security fence that concerned JRS&G in 1994 is contained within the larger fenced area and cut through JRS&G's plant area in the east-central portion of the property. This fence was relocated later in 1994 to allow JRS&G access to its plant area under the condition that JRS&G not intrude into the area enclosed by the internal security fence. *Id.* The internal security fence was moved again in 1996 and in May of 1998. The AIC remained fenced off each time the internal security fence was moved. However, JRS&G continued to mine sand and gravel in parts of the AIC as late as 1996. *Sand & Gravel I*, 57 Fed. Cl. at 189.

During the 1990s, JRS&G and the EPA disagreed on numerous issues. Counsel for JRS&G wrote a series of letters from 1992-1994 asserting JRS&G's property rights and entitlement to just compensation. *Id.* at 184. In addition to the letters, JRS&G repeatedly physically interfered with the EPA's operations.[6] As a result of the disputes between JRS&G and the EPA, on December 18, 1996, the EPA issued an Administrative Order requiring JRS&G to cooperate with the EPA. *Id.* The Administrative Order defined the metes and bounds of the AIC and forbade JRS&G from mining within the AIC. *Id.* at 185. The order also forbade JRS&G from further interference with the EPA and threatened a fine of $ 25,000 per day of noncompliance with the order. *Id.* Disputes arose regarding JRS&G's compliance with the Administrative Order, and on March 23, 1998, the United States District Court for the Eastern District of Michigan entered an order enjoining JRS&G from further interference with the EPA's remedial efforts. *Id.* Shortly after the issuance of the

district court's order, the fence was realigned. This fence realignment was complete in May of 1998. *Id.*

II.

On May 20, 2002, JRS&G filed suit in the Court of Federal Claims. In its complaint, JRS&G alleged that the EPA's construction of the landfill cap, occupation of the AIC, construction of fences and access roads, and installation of groundwater monitoring wells amounted to a permanent physical taking. Compl. at 4-5, 9-11. JRS&G also alleged that the court orders created an easement appurtenant for access by the EPA and were thus a physical taking by the EPA. *Id.* at 11-13.

In due course, the government moved for dismissal of the complaint for lack of jurisdiction on the ground that JRS&G's suit was untimely.[7] The government argued that JRS&G's suit was time-barred because it was filed after the running of the six-year limitations period of 28 U.S.C. § 2501. *Sand & Gravel I*, 57 Fed. Cl. at 186. According to the government, JRS&G's claim accrued in December of 1992, when the government physically occupied the property, installed monitoring wells, and fenced off parts of the Parrish property. *Id.* On July 27, 2003, the Court of Federal Claims denied the government's motion with respect to most of the Parrish property that was allegedly taken because it concluded that the government had not met its burden of showing that there was no genuine issue of material fact as to whether the government had "clearly and permanently" taken the property in 1992. *Id.* at 189. The alleged taking in 1992 was not permanent, the court found, because (i) JRS&G was allowed access to the property after protesting the construction of the

fence, (ii) it continued to mine sand and gravel on the property, including the AIC, between 1991 and 1996, and (iii) it was allowed to tour the landfill, which was within the AIC. *Id.* The court acknowledged that JRS&G had been deprived of the right to exclude others from the Parrish property in 1992. However, it determined that the government presence on the property was not sufficiently permanent and exclusive to comprise a physical taking until at least late 1996, when the Administrative Order was issued. *Id.* The Court of Federal Claims also rejected the government's argument that because JRS&G knew it had a potential takings claim as early as 1992-1994, the claim had accrued. *Id.* at 190-93. Instead, the court found that JRS&G did not know or have reason to know of the accrual of its claim under *United States v. Dickinson*, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947), because the situation on the Parrish property did not stabilize until 1996 when the EPA issued the Administrative Order, defining the metes and bounds of the AIC and barring JRS&G from entry. *Sand & Gravel II*, 57 Fed. Cl. at 192-93. The court declined to pinpoint when the claim accrued, but found that the government had failed to meet its burden on summary judgment of demonstrating that there was no genuine issue of material fact as to whether the claim accrued more than six years prior to May 20, 2002, when JRS&G filed its complaint. *Id.* at 193. Accordingly, the court denied the government's motion to dismiss with respect to most of the property that allegedly had been taken. *Id.*

The Court of Federal Claims, however, did grant the government's motion to dismiss insofar as it related to JRS&G's claim with respect to the monitoring wells

placed on the property in March of 1989. *Id.* at 183, 189. Under *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991), the court found that the wells were sufficiently permanent to comprise a physical taking upon their installation. *Sand & Gravel I*, 57 Fed. Cl. at 189. Because the wells were installed over six years before JRS&G filed its complaint, the court granted summary judgment based on the statute of limitations with regard to the wells.[8] *Id.* at 193.

Subsequently, the parties cross-moved for summary judgment on liability. On April 2, 2004, the Court of Federal Claims granted in part the government's motion for summary judgment and denied JRS&G's motion for partial summary judgment. *John R. Sand & Gravel v. United States*, 60 Fed. Cl. 230 (2004) ("*Sand & Gravel II*"). The court agreed with the government's contention that background principles of Michigan nuisance and property law limit the scope of compensable property interests in a physical takings case such as JRS&G's. *Id.* at 239. The court then set forth three steps for determining whether background principles of Michigan nuisance and property law limited the use of JRS&G's leasehold: (i) JRS&G had to demonstrate possession of a property interest; (ii) the government had to identify background principles of Michigan law prohibiting certain uses of the property; and (iii) the government had to connect those background principles to the facts to show that the use of the property intended by JRS&G was barred by applicable Michigan law. *Id.* at 240. The court found that JRS&G had demonstrated its possession of a property interest and that the government had identified applicable principles of Michigan nuisance and property law. *Id.* at 242-51. However, the court

denied the government's motion for summary judgment without prejudice because it found that the government had not sufficiently demonstrated the existence of each of the alleged nuisances at the site. *Id.* at 243, 245, 247-51.

After a bench trial, the Court of Federal Claims issued an opinion on October 29, 2004, finding that the government's actions had not taken JRS&G's property. *Sand & Gravel III*, 62 Fed. Cl. at 589. The Court of Federal Claims revisited the question of when JRS&G's takings claim accrued. *Id.* at 562-63. The court found that JRS&G's claim accrued when the government first permanently and exclusively occupied JRS&G's property. *Id.* at 563. The court determined that this occurred in May of 1998, when the government completed its relocation of the perimeter fence around the AIC. *Id.* The court found that the claim had not accrued prior to May of 1998 because ongoing access disputes between the government and JRS&G precluded the government from permanently and exclusively occupying the property. *Id.*

After setting the date of accrual as May of 1998, the Court of Federal Claims addressed the merits of JRS&G's takings claim. The court noted that JRS&G, as the plaintiff, bore the burden of demonstrating a legally-cognizable property interest under the framework set out in *Sand & Gravel II*. *Id.* at 562. The court found that JRS&G had not met this burden because JRS&G had taken its lease to the Parrish property subject to the landfill. *Id.* at 568, 570. The court noted that JRS&G knew about the landfill when it signed the lease and had allowed the landfill to operate despite its right to prohibit the landfill's operations

under the terms of the lease. *Id.* The court charged JRS&G with "knowledge of, acquiescence in, and cooperation with" the Parrishes' landfill operation. *Id.* at 570. "[F]airness and justice," the court concluded, required JRS&G, as a party participating in the illegal landfill operation, to bear the burden of the cleanup in the form of the EPA's presence on the property. *Id.* at 572 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)). Therefore, the court denied JRS&G's takings claims on the merits.

The court continued that it was, "in the interest of judicial economy and efficiency" to elucidate a second reason why JRS&G could not recover for a physical taking. *Id.* The court found that continued mining in the AIC would contravene remediation efforts, pollute groundwater, and risk fires from methane. *Id.* at 579-88. Under Michigan law, the court found that activities resulting in these risks are prohibited. *Id.* at 589. Thus, under the framework set forth in *Sand & Gravel II*, the court found that background principles of Michigan law, including both Michigan's Natural Resources and Environmental Protection Act, Mich. Comp. Laws §§ 324.20101-.20142 (2006), and Michigan general nuisance law, allowed the EPA to enter the property to prevent JRS&G from using the property in a way that would result in these nuisances. *Sand & Gravel III*, 62 Fed. Cl. at 589.

JRS&G appeals from the decision of the Court of Federal Claims granting judgment in favor of the government. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

On appeal, JRS&G argues that the Court of Federal Claims erred when it found that JRS&G's takings claim failed because JRS&G had taken its lease subject to a pre-existing landfill. JRS&G also argues that the principles of "fairness and justice" relied upon by the Court of Federal Claims in its resolution of this issue apply only in regulatory takings cases--not in physical takings cases like JRS&G's. Likewise, JRS&G argues that the Court of Federal Claims's alternative rationale was incorrect because background principles of nuisance and property law only limit property interests for the purpose of regulatory takings.

The government responds that the Court of Federal Claims did not err in concluding that JRS&G's takings claim failed because JRS&G took the lease for the Parrish property subject to the landfill. Based on principles of "fairness and justice," the government contends that the court properly found that the cooperation between the Parrishes' landfill operation and JRS&G barred JRS&G from recovering for a taking. With regard to the court's alternative rationale based on nuisance law, the government argues that background principles of nuisance and property law, as articulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), properly apply in physical takings cases. The government urges that the Court of Federal Claims properly applied Michigan's background principles of nuisance and property law and thus correctly found that JRS&G's takings claim was barred under this theory. On appeal, the government does not challenge the decision of the Court of Federal Claims in

Sand & Gravel I rejecting its argument that the court lacked jurisdiction because JRS&G's claim was time-barred.

Although the government does not raise a jurisdictional challenge on appeal, an amicus, the Metamora Group, does.[9] The Metamora Group argues that the Court of Federal Claims erred in exercising jurisdiction over JRS&G's claim because the claim was barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501. In order for a takings claim to accrue and therefore begin the running of the statute of limitations, the Metamora Group contends, the government's occupation need not have been exclusive. Instead, the amicus argues that a property owner's right to exclude others is the focus of determining when a takings claim accrues. Thus, the amicus argues that the claim accrued over six years prior to the filing of JRS&G's complaint in 1989, when the EPA constructed the storage pad on the Parrish property and began removing drums. Alternatively, the Metamora Group argues that the claim accrued in 1992, when the government constructed a fence barring others from the site, or in 1994, when the government constructed the internal security fence that interfered with JRS&G's operations. By 1994, the amicus argues, the government had declared itself a co-tenant of the property and thus JRS&G's claim had accrued. The amicus argues that to the extent that JRS&G mined within the AIC in 1996 or entered the area enclosed by the fence, it was without the government's permission and did not alter the date of accrual. The Metamora Group contends that by 1994 the government's construction of fences was sufficiently permanent in nature to cause a physical takings claim to accrue.

Finally, the Metamora Group states that the court erred in relying on Dickinson v. United States in its ruling in *Sand & Gravel I* that JRS&G's claim did not stabilize until within six years of the filing of JRS&G's complaint because Dickinson is only applicable in cases where slow natural processes, such as flooding, are involved.

JRS&G responds in its reply brief that its takings claim accrued when the government realigned the fence encompassing the AIC in May of 1998. JRS&G contends that the Court of Federal Claims properly found that the fences constructed in 1992-1993 and 1994 did not permanently interfere with JRS&G's leasehold and that therefore no takings claim accrued at those times. JRS&G argues that the March 1998 district court order granted the government the undisputed authority to control JRS&G's leasehold property for the first time. Prior to this time, JRS&G asserts, the government's actions were unauthorized and therefore no takings claim accrued. JRS&G attacks the amicus's argument that the 1992-1993 and 1994 fences were sufficiently permanent to form the basis for a takings claim by noting that these fences were removed and therefore cannot form the basis for a permanent takings claim. At oral argument, counsel for the government agreed with JRS&G that its takings claim accrued in May of 1998 and that therefore the statute of limitations, 28 U.S.C. § 2501, did not bar JRS&G's claim.

For the reasons set forth below, we agree with the amicus that JRS&G's suit in the Court of Federal Claims was time-barred and that, therefore, the court lacked jurisdiction. Accordingly, we vacate the court's

decision and remand the case to the court with the instruction that it dismiss JRS&G's complaint.

II.

A.

As an appellate court, we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338 (1934) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."); *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003) ("[U]nder federal rules any court at any stage in the proceedings may address jurisdictional issues. Thus, even if the issue is not properly raised, this court sua sponte may consider all bases for the trial court's jurisdiction."). We review the Court of Federal Claims findings of fact for clear error and its legal rulings without deference. *Banks v. United States*, 314 F.3d 1304, 1307 (Fed. Cir. 2003). Accordingly, we review the trial court's findings of fact relating to jurisdictional issues for clear error. *Id.* at 1308 (stating that the Court of Federal Claims's "jurisdictional findings of fact are reviewed for clear error"). In this case, the pertinent jurisdictional facts are not in dispute. The Court of Federal Claims's jurisdiction is a question of law which we review de novo. *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000) ("A determination of the Court of Federal Claims' jurisdiction presents a question of law that we review de novo.").

The Tucker Act, 28 U.S.C. § 1491(a)(1), provides the Court of Federal Claims with jurisdiction over takings claims brought against the United States. *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004). Pursuant to 28 U.S.C. § 2501, claims brought in the Court of Federal Claims under the Tucker Act are "barred unless the petition thereon is filed within six years after such claim first accrues." The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims. *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitations for causes of action against the United States, being conditions of the waiver of sovereign immunity, are jurisdictional in nature."); *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002) ("Section 2501 constitutes a jurisdictional limit on the authority of the Court of Federal Claims."); *Caguas Cent. Fed. Sav. Bank v. United States*, 215 F.3d 1304, 1310 (Fed. Cir. 2000) ("In the Court of Federal Claims, the statute of limitations is jurisdictional, because filing within the six-year period was a condition of the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. § 1491(a)(1)."); *Seldovia Native Ass'n v. United States*, 144 F.3d 769, 774 (Fed. Cir. 1998); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). Due to the jurisdictional nature of section 2501 it may not be waived. *Hopland Band of Pomo Indians*, 855 F.2d at 1577 ("[S]ince the 6-year limitations period of section 2501, serves as a jurisdictional limitation rather than simply as an affirmative defense, such statutes of limitations have been held as not capable of waiver or subject to an estoppel, whether pled or not.") (internal quotation marks omitted).

The dissenting opinion cites several recent Supreme Court decisions in support of the proposition that the statute of limitations set forth at section 2501 is not jurisdictional, including *Day v. McDonough*, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005)(per curiam), *Scarborough v. Principi*, 541 U.S. 401, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004), and *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). None of the foregoing decisions address section 2501. *Day*, 126 S. Ct. at 1681 (holding that that the one-year statute of limitations for filing a habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 is not jurisdictional); *Arbaugh*, 126 S. Ct. at 1245 (addressing whether the numerosity requirement of 42 U.S.C. § 2000e(b) is jurisdictional); *Eberhart*, 126 S. Ct. at 405 (finding that the seven-day time limit for filing a motion for a new trial under Federal Rules of Criminal Procedure 33(b)(2) and 45(b)(2) is not jurisdictional); *Scarborough*, 541 U.S. at 414 (finding that the thirty-day time limit for filing a claim for fees under 28 U.S.C. § 2412(d)(1)(B) is not jurisdictional); *Kontrick*, 540 U.S. at 456 (holding that a time limit for filing a complaint as a creditor in bankruptcy proceedings is not jurisdictional). Instead, the statutes at issue involved minor procedural requirements and time limits that the Court characterized as non-jurisdictional "claim-processing rules." E.g., *Kontrick*, 540 U.S. at 456. Day is the only case involving a statute of limitations. However, that case did not involve a suit against the United States for money damages. In contrast to a non-jurisdictional claim-processing rule or the statute of limitations in Day, section 2501 sets forth a condition

that must be met for a waiver of sovereign immunity in a suit for money damages against the United States.

We have continued to hold that section 2501 creates a jurisdictional prerequisite even after the Supreme Court decided Kontrick and its progeny. See, e.g., *MacLean v. United States*, 454 F.3d 1334, 2006 U.S. App. LEXIS 17352, _ F.3d _ , No. 05-5149, 2006 WL 1897047, at *3 (Fed. Cir. July 12, 2006) ("In the Court of Federal Claims, the statute of limitations 'is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed.'" (quoting *Hopland*, 855 F.2d at 1576-77)); *Goodrich v. United States*, 434 F.3d 1329, 1331, 1336 (Fed. Cir. 2006) (affirming the Court of Federal Claims's decision dismissing Goodrich's takings claim for lack of jurisdiction under section 2501 (citing *Goodrich v. United States*, 63 Fed. Cl. 477, 481 (2005))); *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1378 (Fed. Cir. 2005) ("The statute of limitations is jurisdictional in nature and, as an express limitation on the waiver of sovereign immunity, may not be waived.") (citation omitted).

Further, the six-year statute of limitations of section 2501 enjoys a longstanding pedigree as a jurisdictional requirement. Since 1883 when the Court first held that the statute of limitations was jurisdictional in *Kendall v. United States*, 107 U.S. 123, 125, 2 S. Ct. 277, 27 L. Ed. 437, 18 Ct. Cl. 758 (1883), the Court has consistently maintained that the time limit is jurisdictional and therefore cannot be waived. *United States v. Wardwell*, 172 U.S. 48, 52, 19 S. Ct. 86, 43 L. Ed. 360, 34 Ct. Cl. 535 (1898) ("[Section 2501's predecessor] is not merely a

statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance."); see also *United States v. New York*, 160 U.S. 598, 619, 16 S. Ct. 402, 40 L. Ed. 551, 31 Ct. Cl. 459 (1896); *Austin v. UnitedStates*, 155 U.S. 417, 427, 15 S. Ct. 167, 39 L. Ed. 206, 30 Ct. Cl. 484 (1894); *De Arnaud v. United States*, 151 U.S. 483, 495-96, 14 S. Ct. 374, 38 L. Ed. 244, 29 Ct. Cl. 555(1894); *Finn v. United States*, 123 U.S. 227, 232, 233, 8 S. Ct. 82, 31 L. Ed. 128, 23 Ct. Cl. 486 (1894); *Rice v. United States*, 122 U.S. 611, 618-19, 7 S. Ct. 1377, 30 L. Ed. 793 (1887). We recognize the Supreme Court's recent jurisprudence concerning claim-processing rules, but do not think that section 2501 falls in that category. Therefore, we are unwilling to disturb the well-settled law that section 2501 creates a jurisdictional condition precedent for suit in the Court of Federal Claims, which may not be waived by the parties. See, e.g., *De Arnaud*, 151 U.S. at 495-96 ("'The general rule that limitation does not operate by its own force as a bar, but is a defen[s]e, and that the party making such a defen[s]e must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defen[s]e, either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by the statute upon suits against the United States in the Court of Claims.'" (quoting *Finn*, 123 U.S. at 232, 233)).

A takings claim accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Goodrich*, 434 F.3d at 1333 (quoting *Hopland*, 855 F.2d at 1577); see also *Bowen v. United States*, 292 F.3d 1383, 1385

(Fed. Cir. 2002). In addition, the claim only accrues if the plaintiff knew or should have known of the existence of the events fixing the government's liability. *Goodrich*, 434 F.3d at 1333; *Hopland*, 855 F.2d at 1577; *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed. Cir. 1988).

B.

The question we must decide then is when JRS&G's takings claim accrued. The Court of Federal Claims held that the claim accrued in May of 1998 when the government relocated the fence around the AIC. We conclude, however, that the claim accrued not later than February of 1994 when the government constructed the fence that cut off JRS&G's access to its plant area. That date was more than six years before JRS&G filed its complaint on May 20, 2002.

The Fifth Amendment provides,"[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. Property rights in a physical thing consist of a bundle of rights, including the rights to possess, to use, and to dispose of the physical thing. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78, 65 S. Ct. 357, 89 L. Ed. 311 (1945) (finding that property rights "denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

The right to exclude others is "one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435; see also *Nollan v. Cal.*

Coastal Comm'n, 483 U.S. 825, 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) (noting that the right to exclude others is one of the most essential sticks in the bundle of property rights); *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *Hendler*, 952 F.2d at 1374 (stating that "[i]n the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession-the right to exclude strangers, or for that matter friends, but especially the Government"). When the government permanently and physically occupies property, it effectively destroys the owner's right to exclude, as well as the owner's right to make non-possessory use of the property. *Loretto*, 458 U.S. at 435-36. Due to the importance of a property owner's right to exclude, we have held that "[t]he Government does not have the right to declare itself a co-tenant-in-possession with a property owner." *Hendler*, 952 F.2d at 1374; see also *Kaiser Aetna*, 444 U.S. at 179-80 (holding that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation"). Thus, a permanent physical occupation by the government is a per se physical taking requiring compensation under the Fifth Amendment because it destroys, among other rights, a property owner's right to exclude. *Loretto*, 458 U.S. at 441; *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002) ("[A] permanent physical occupation of property, no matter how slight, is a per se taking."); *Hendler*, 952 F.2d at 1375 ("A physical occupation of private property by the government which is adjudged to be of a

permanent nature is a taking, and that is true without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.").

"A physical occupation . . . is a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of . . . property." *Boise Cascade Corp.*, 296 F.3d at 1353. Thus, physical occupation by the government only comprises a taking when that occupation is "permanent." *Id.*; *Boling v. UnitedStates*, 220 F.3d 1365, 1370 (Fed. Cir. 2000); *Hendler*, 952 F.2d at 1375. "Permanent" has a special meaning in the determination of whether a physical occupation has occurred. See *Hendler*, 952 F.2d at 1376. In the context of physical takings "'permanent' does not mean forever, or anything like it." *Id.* A government occupation is "permanent" when the government's "intrusion is a substantial physical occupancy of private property." *Id.* at 1377. The government's occupation may be permanent even if it is not "exclusive, or continuous and uninterrupted." *Id.*; see also *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993) ("[A] permanent physical occupation need not be continuous and uninterrupted. An intermittent intrusion still causes a taking.")(citations omitted). The Supreme Court held inLoretto that the placement of cable and connection boxes on the plaintiff's property was a physical taking. 458 U.S. at 441. In Hendler, we held that the placement of groundwater monitoring wells on the plaintiff's property and the government's periodic presence for installing and servicing the wells was "permanent" and therefore a physical taking. 952 F.2d at 1377. In contrast, we noted that a transient and relatively

inconsequential incursion by the government, such as a truckdriver parking on a vacant lotto eat lunch, is not sufficiently permanent to comprise a taking. *Id.* at 1376-77. Similarly, in Boise Cascade, we determined that government surveyors who briefly entered the plaintiff's land over a period of five months to perform owl surveys did not "permanently" occupy the plaintiff's property. 296 F.3d at 1356. Thus, the determination of whether government occupancy is "permanent" is highly fact-specific. In any event, the installation of fixed physical structures, such as the cable and cable connections in Loretto or the groundwater monitoring wells in Hendler is typical of a "permanent" occupation, while the transient entry of persons via government authority on a plaintiff's property is generally not "permanent."

C.

We hold that JRS&G's takings claim accrued not later than February of 1994 upon the completion of the 1994 fence. The 1994 security fence ran across JRS&G's plant area, cutting off JRS&G's access to its pond and stockpile areas. *Sand & Gravel I*, 57 Fed. Cl. at 184. The six-foot fences, with posts that were anchored by concrete in some instances, comprised just the sort of permanent structure have been found to form the basis for a physical takings claim. See *Loretto*, 458 U.S. at 422 (finding cables attached by screws and nails and a box attached by bolts to be sufficiently permanent to comprise a physical taking); see also *Hendler*, 952 F.2d at 1376 (finding that groundwater monitoring wells were permanent in nature given their structure). Thus, the EPA took possession of the property at least as of

1994 when it erected permanent structures to bar JRS&G from portions of the Parrish property.[10]

The EPA's presence destroyed JRS&G's right to exclude others from its leasehold, one of the most treasured rights of property owners. See *Kaiser Aetna*, 444 U.S. at 176. Further, the EPA's 1994 fence also inhibited JRS&G's right to use its property free of interference. In fact, the firm conducting the remediation efforts stated that the removal of the offending portions of the 1994 fence "will be contingent upon John R's agreement to stay out of the new security area." Pl.'s Mem. In Opp'n to Def.'s Mot. for J. on the Pleadings, Exh. 10 (Jan.23, 2003). Thus, the EPA and its agents placed conditions on the use of JRS&G's property in exchange for relocating the fence - destroying the use strand in JRS&G's bundle of property rights in addition to JRS&G's right to exclude. Based on the foregoing, we find that, not later than 1994, the EPA had effectively declared itself a co-tenant in possession of a portion of the property and that accordingly, JRS&G's takings claim accrued at that time.

Although we acknowledge that the EPA relocated portions of the fence in 1994 to accommodate JRS&G's need for access to its plant area, we note that the fence remained on the property and that the EPA continued to carry on its remediation activities on the leasehold. The net effect of the restructuring of the fence in 1994 was to reduce the area around the landfill enclosed by fencing - the government did not remove the fence entirely. The EPA's willingness to alter the parameters of the fence does not change the fact that the fence itself was permanent in nature. The fact that JRS&G

interfered with the EPA's efforts and ignored the fence until ordered in 1998 by the United States District Court for the Eastern District of Michigan to cooperate with the EPA, does not alter our conclusion. Likewise, we find that a physical occupation of the fenced area occurred despiteJ RS&G's continued and permitted use of the area not enclosed by the 1994 fence. See *Loretto*, 458 U.S. at 430 (finding that a permanent physical occupation is a taking even if the government "occup[ies] only relatively insubstantial amounts of space and do[es] not seriously interfere with the landowners use of the rest of his land").

We find unpersuasive the Court of Federal Claims's reliance in *Sand & Gravel I* on *767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995). In *767 Third Avenue Associates*, the plaintiff was a landlord who leased three properties to offices of the Socialist Federal Republic of Yugoslavia. *Id.* at 1576. In response to political unrest in Yugoslavia, the United States government ordered closure of the operations of the three tenants. *Id.* at 1577. After the three tenants left, agents of the Department of the Treasury inspected the plaintiff's premises and posted a notice on the door of each office stating that it was "CLOSED BY ORDER OF THE UNITED STATES DEPARTMENT OF THE TREASURY" and that "NO ACCESS TO THESE PREMISES IS PERMITTED." We held that there was no per se physical taking because "the government did not physically occupy the premises at 767 Third Avenue." *Id.* at 1583. We noted that the notices were up for less than three months, that the locks were not changed, that nothing physical was attached to the premises except for the notices, and that no guards were placed at the door. *Id.* Further, the

landlord was allowed access on request. *Id.* The Court of Federal Claims drew a comparison between 767 Third Avenue Associates's facts and those relating to the 1992 and 1994 fences by noting that JRS&G was allowed access to its plant area shortly after it protested the fences. *Id.* However, unlike 767 Third Avenue Associates, the government physically entered JRS&G's property for a prolonged period. Further, remediation equipment was stored on the property for extended periods, and permanent physical structures, fences, were erected. The mere fact that JRS&G was allowed access to portions of the property on request does not alter the fact that the government had a presence of a "permanent nature" on JRS&G's leasehold not later than 1994. See *Skip Kirchdorfer, Inc.*, 6 F.3d at 1583 (holding that "retention of some access rights . . . does not preclude a per se taking").

In addition to concluding that all the events fixing the government's liability occurred not later than 1994, we think that the Court of Federal Claims erred in concluding that JRS&G neither knew nor should have known of those events as of 1994. See *Sand & Gravel I*, 57 Fed. Cl. at 192-93. The Court of Federal Claims found that JRS&G's claims did not stabilize under *Dickinson*, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789, until at least 1996 due to the changing boundaries of the fences and JRS&G's ability to mine within the AIC during the 1992-1996 period.[11] See *Sand & Gravel I*, 57 Fed. Cl. at 192. In *Dickinson*, property owners experienced intermittent flooding and could not determine at the outset the frequency or permanency of the flooding. Thus, only when the situation "stabilized" did a takings claim accrue. 331 U.S. at 749. In *Northwest Louisiana Fish & Game Preserve*

Commission v. United States, 446 F.3d 1285, 1290-91 (Fed. Cir. 2006), we recently applied *Dickinson* to the overgrowth of aquatic weeds in a lake controlled by the United States Corps of Engineers. In contrast, the present case does not involve the type of gradual physical process that was involved in *Dickinson* or *Northwest Louisiana Fish*, but rather the entry of the EPA onto the plaintiff's leasehold. Both the Supreme Court and our court have acknowledged that the *Dickinson* stabilization doctrine is only applicable in cases involving gradual physical processes. See, e.g., *United States v. Dow*, 357 U.S. 17, 27, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use."); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998) ("The *Dickinson* stabilization principle, however, does not apply outside its context. Later cases have essentially confined the stabilization doctrine to the class of flooding cases from which it originated."). We conclude that the Court of Federal Claims erred by extending the *Dickinson* stabilization doctrine outside the realm of gradual physical processes caused by government action, such as flooding or plant overgrowth, into the area of direct government entry onto property. Therefore, JRS&G's takings claim accrued no later than February of 1994. That JRS&G knew or should have known that its claim had accrued at that time is evidenced by the letters written by JRS&G between 1992 and 1994 threatening suit against the EPA. See *Sand & Gravel I*, 57 Fed. Cl. at 184.

Finally, we reject JRS&G's argument that its claim did not accrue until 1998 because the EPA's actions were not authorized until the United States District Court for the Eastern District of Michigan issued its March 1998 order. This argument lacks merit because, when the EPA and its agents entered JRS&G's leasehold, the government was acting in accordance with the authority granted to the EPA by Congress in CERCLA.[12] See *Armijo v. United States*, 229 Ct. Cl. 34, 41, 663 F.2d 90 (1981) (finding a Tucker Act claim viable when Congress authorizes the government to take property).

Because we decide the case on jurisdictional grounds, it is unnecessary to address whether background principles of nuisance and property law, as articulated in Lucas, apply in physical takings, or whether JRS&G took the lease subject to the landfill.

CONCLUSION

In sum, we hold that JRS&G's takings claim accrued not later than February of 1994, when the security fence was complete. JRS&G did not file its complaint until over six years later on May 20, 2002. Therefore, the claim is barred by the statute of limitations and the Court of Federal Claims lacks jurisdiction to consider it. Accordingly, we vacate the Court of Federal Claims's decision and remand the case to the court with the instruction that it dismiss JRS&G's complaint.

COSTS

Each party shall bear its own costs.

VACATED and REMANDED

Appendix A

[SEE DIAGRAM AT END OF APPENDIX].

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 According to the terms of the lease, JRS&G received "exclusive use" of the property

for the purpose of stripping the land, taking out and removing therefrom the marketable stone and sand, which is, [or] which may hereafter be found on, in or under said land, together with the right to construct or build, and to make all excavations, pits openings, ditches, roadways and other improvements upon the said premises, which are or may become necessary or suitable for removing sand and stone from the said premises.

Sand & Gravel III, 62 Fed. Cl. at 564.

n2 The landfill cap system involves a cap of impermeable material over the landfill. The cap is sloped to cause water to run off into a system of ditches. The ditches feed into a designated retention area away from the landfill. *Id.* at 560. The retention area is shown on the map at Appendix A under the heading "Storm Water Retention Pond." The cap system prevents water from percolating through the hazardous waste in the landfill and into the aquifer below, thereby contaminating the groundwater.

n3 A ROD is a public record of an EPA decision that

describes actions the EPA intends to take. See 40 C.F.R. 6.105(g)(2006). This includes the actions the EPA intends to take with respect to a site containing hazardous waste.

n4 The EPA installed the storage pad on the property in 1989 to store the drums excavated on the site. The pad was later abandoned by the EPA. JRS&G does not allege a taking of the storage pad in this appeal. On the map at Appendix A the storage pad is labeled "Asphalt Pad."

n5 The map shows that in 1994 the fence constructed in 1992 still encircled the entirety of JRS&G's plant area and its main pit.

n6 JRS&G's interference included cutting the locks and entering fenced-off portions of the property, blocking the EPA's access to the site by obstructing the access road either by piling dirt on it or by flooding it through overfilling its siltation pond, and threatening to drive its loaders through the gates in the fence unless it was given access to fenced-off portions of the property.

n7 The government moved for judgment on the pleadings, or in the in the alternative, summary judgment. *Sand & Gravel I*, 57 Fed. Cl. at 182-83. The court treated the motion as one for summary judgment because the parties included materials outside the pleadings in their briefing. *Id.* at 185.

n8 On appeal, JRS&G has not challenged the Court of Federal Claims's holding that its takings claim for the groundwater monitoring wells is barred by the statute of limitations.

n9 The Metamora Group consists of twelve corporations that contributed waste to the Metamora Landfill. With one exception, these twelve corporations signed a consent decree with the EPA in 1993 in which they agreed to fund the remediation of the Metamora Landfill. Under the consent degree, the corporations agreed to provide "any compensation that the United States may be required to pay to the property owner."

The Metamora Group filed a motion to intervene on October 24, 2003, which was denied by the Court of Federal Claims. *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645 (2004). We affirmed the denial "without prejudice to the application of the Metamora Group to participate as amicus curiae in any appeal to this court of the decision on the merits." *John R. Sand & Gravel Co. v. Brunswick Corp.*, 143 Fed. Appx. 317, 319 (Fed.Cir. July 22, 2005). Accordingly, the Metamora Group has filed an amicus brief urging us to find that JRS&G's claim is barred by the statute of limitations. Alternatively, the Metamora Group argues that the decision of the Court of Federal Claims should be affirmed on the merits.

n10 We express no opinion as to whether the construction of the 1992-1993 fence around the entirety of JRS&G's operations was sufficiently permanent for a takings claim to accrue.

Although not argued by the amicus, we note that the EPA's issuance of RODs in 1986 and 1990 was not sufficient for a physical takings claim to accrue in this case. In *Goodrich v. United States*, 434 F.3d 1329 (Fed. Cir. 2006), we found that a takings claim accrued upon the issuance of an ROD ordering that Goodrich allow

another rancher's animals to drink on his allotment of federal land. *Id.* at 1332. The agency specified both the number of animals and the rancher to whom they belonged. *Id.* We affirmed the Court of Federal Claims's characterization of the taking as regulatory rather than physical and its finding that the regulatory takings claim accrued upon the issuance of the ROD. *Id.* at 1333-35. We find that the date of issuance of the 1986 and 1990 RODs did not mark the accrual of JRS&G's takings claim for two reasons. First, unlike Goodrich, JRS&G's claim is for a physical taking, rather than a regulatory taking. Second, the two RODs issued with regard to the Metamora Landfill did not contain the level of detail about the government's actions necessary for a claim to accrue. The 1986 ROD set forth remedies for removal of drums of waste, which the EPA predicted would take six to eight months. The 1986 ROD did not set forth the long-term plan for site remediation challenged by JRS&G. The 1990 ROD did propose a long-term remediation plan involving a landfill cap system. However, the ROD did not set forth the metes and bounds of the landfill cap or a specific timeframe for its completion. *Sand & Gravel I*, 57 Fed. Cl. at 184.

n11 On appeal, JRS&G states that it mined within the AIC as late as 1997. For purposes of our decision, whether JRS&G last mined within the AIC in 1996 or 1997 does not matter.

n12 Pursuant to CERCLA, the EPA is "authorized to enter at reasonable times any . . . facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may

be or has been generated, stored, treated, disposed of, or transported from." 42 U.S.C. § 9604(e)(1), (e)(3)(A).

NEWMAN, Circuit Judge, dissenting.

The threshold question is whether, more than six years before this suit was filed, all of the events occurred whereby government action can be held to have permanently deprived JRS&G of its property rights. This is a question of fact, and its answer determines whether this lawsuit was timely brought. However, it is not a question of "jurisdiction," for the Court of Federal Claims, without dispute, had jurisdiction of the parties and the subject matter. See *United States v. Causby*, 328 U.S. 256, 267, 66 S. Ct. 1062, 90 L. Ed. 1206, 106 Ct. Cl. 854 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine"). The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already "has jurisdiction":

28 U.S.C. § 2501. Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Contrary to the position of the panel majority, the limitations period is not itself a matter of jurisdiction. See *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) (the "statutory language confirms that the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims"); *Grass Valley Terrace v. United States*, 69 Fed. Cl. 341, 347 (2005) ("This plain

English interpretation of the statute is supported by the Federal Circuit cases that have *closely examined* this issue") (emphasis in original). My colleagues read the phrase "has jurisdiction" out of the statute and thereby violate the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001). Their interpretation is also inconsistent with the trial court's own rules, which state that the "statute of limitations" is an "affirmative defense." Rule of the Court of Federal Claims 8(c).

The panel majority reasons that § 2501 is "jurisdictional" because it is a "condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States." Maj. op. at 17. That is incorrect. Section 2501 is an unexceptional statute of limitations that is interpreted like any other statute of limitations. See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) (statutes of limitations on suits against the government should be treated "in the same way" as statutes of limitations in private suits); *Franconia Associates v. United States*, 536 U.S. 129, 145, 122 S. Ct. 1993, 153 L. Ed. 2d 132 (1986) ("limitations principles should generally apply to the Government in the same way that they apply to private parties"). In *Franconia Associates* the Court rejected the government's attempt to ascribe a "special" interpretation to § 2501 on a theory of sovereign immunity:

We do not agree that § 2501 creates a special accrual rule for suits against the United States. Contrary to the Government's contention, the text of § 2501 is unexceptional: A number of contemporaneous state statutes of limitations applicable to suits between private parties also tie the commencement of the limitations period to the date a claim "first accrues." . . . In line with our recognition that limitations principles should generally apply to the Government "in the same way that" they apply to private parties, we reject the Government's proposed construction of § 2501. That position, we conclude, presents an "unduly restrictive" reading of the congressional waiver of sovereign immunity, rather than "a realistic assessment of legislative intent."

536 U.S. at 145 (internal citations omitted). My colleagues make the same mistake; they fail to see § 2501 for what it is: an "unexceptional" statute of limitations that is interpreted like any other. Instead, they impose an "unduly restrictive" interpretation on § 2501, transforming it into a "jurisdictional" statute, contrary to the statutory text, and contrary to precedent.

The panel majority relies on Supreme Court cases interpreting a superceded statute, and Federal Circuit panel decisions applying overruled precedent. For example, *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988) relies on *Soriano v. United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 1 L. Ed. 2d 306 (1957), which interprets § 2501 as a jurisdictional bar not subject to tolling. The Court in *Irwin* overruled *Soriano*, and clarified that limitations principles apply to the government "in the same way" as

they are applied to private parties,e.g., they may be tolled or waived in appropriate circumstances. *Irwin*, 498 U.S. at 94-96. My colleagues cite *Goodrich v. United States*, 434 F.3d 1329, 1336 (Fed. Cir. 2006), and *Caguas Cent. Fed. Savings Bank v. United States*, 215 F.3d 1304, 1310 (Fed. Cir. 2000), which rely solely on *Hopland*. They also cite *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002), which cites *Caguas, and Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1378 (Fed. Cir. 2005), which cites *Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990), a case also citing *Hopland*. None of these cases grounded on *Hopland* accounts for the Court's recent jurisprudence, under which it is clear that it is incorrect to accord unique status to § 2501 and hold that it is a limit on "jurisdiction." My colleagues also cite *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003) (*en banc*), which left the matter unresolved.

In contrast, other panel decisions have correctly interpreted § 2501 as a statute of limitations, not a jurisdictional limit on the Court of Federal Claims. See *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n.2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here therefore would seem to be that Venture Coal failed to make its claim within the required limitations period -- that is not a question of subject matter jurisdiction of the" Court of Federal Claims); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims"); *Henke v. United States*, 60 F.3d 795, 798 n.3 (Fed. Cir. 1995) ("The raising of the statutory bar to a remedy does not, as such, deprive the court of jurisdiction to

hear the cause in the first instance. Indeed, the court could not adjudicate the question of the proper application of the statute if it did not have subject matter jurisdiction over the claim"); *Borough of Alpine v. United States*, 923 F.2d 170, 171 n.1 (Fed. Cir. 1991) (despite an untimely filing the "Claims Court has and will continue to have jurisdiction over the subject matter of Contract Disputes Act cases").

The Supreme Court has, in several recent statements, emphasized that statutes of limitations and time prescriptions are not "jurisdictional." See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1242, 163 L. Ed. 2d 1097 (2006) (stating that the Court has established that time prescriptions are not jurisdictional); *Day v. McDonough*, 126 S. Ct. 1675, 1681, 164 L. Ed. 2d 376 (2006) ("A statute of limitations defense, the State acknowledges, is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*") (emphasis in original); *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403, 405, 163 L. Ed. 2d 14 (2005) ("They are not 'jurisdiction[al],' but are instead 'claim-processing rules,' that may be 'unalterable on a party's application' but 'can nonetheless be forfeited if the party asserting the rule waits too long to raise the point'"); *Scarborough v. Principi*, 541 U.S. 401, 414, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) (time prescriptions are "not properly typed 'jurisdictional'"); *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory

authority").

Thus, the question is whether the statute that sets a six-year limit on claims against the United States has been met on the facts affecting JRS&G. Both the government and JRS&G agree that the statute of limitations has not run. Since it is not "jurisdictional," it need not be considered *sua sponte* by this court.

Despite this clear waiver and concession by the government, my colleagues overrule the Court of Federal Claims, reject the position of the government, and hold that the six-year limitations period started to accrue by February 1994 when the EPA erected its first transient security fence. The Court of Federal Claims found that JRS&G had access to and mining use of much of that property until at least the December 1996 Administrative Order, for the EPA soon moved the fence to enclose a smaller area, and also permitted access by JRS&G to mine sand and gravel in parts of the smaller area. The government recognized and testified that JRS&G was not permanently excluded from the property until May 1998. See Defendant's Response to the Court's Order of July 7, 2004 ("it appears that it was not until May 1998 . . . that plaintiff was clearly and permanently excluded from the AIC [Area of Institutional Controls]"). Nonetheless, my colleagues now rule that since the fence was not entirely removed, the February 1994 exclusion was a permanent taking of the entire area including the area that was used by JRS&G until judicial intervention in 1998.

The Court of Federal Claims applied the Court's three-part test of *Loretto v. Teleprompter Manhattan CATV*

Corp., 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), viz. that a taking occurs only when the property owner has lost the rights to possess, use, and dispose of the property. See, e.g., *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002) (applying the Loretto test). In this case, the Court of Federal Claims found that the three-part test had not been met, except for the permanent wells, because JRS&G retained beneficial use of the property at least until December 1996. No error has been shown in that analysis. On that finding, which must be sustained, the statute of limitations cannot have run.

I am concerned that the court's position today brings serious imprecision to takings law. My colleagues hold that the entire claim is now barred and that irrevocable limitations accrued as to property that JRS&G continued to use during a period for which a Fifth Amendment claim was conspicuously unavailable. The panel majority cites various actions such as "lawyers' letters" to support its theory that JRS&G had knowledge that a taking had already occurred in February 1994, maj. op. at 24, although the effect of the letters was the removal of the fence. The question before the Court of Federal Claims was whether a compensable taking occurred in February 1994 as to the property that was restored to use by JRS&G until at least December 1996. When that court's findings as to the extent of this access and use are reviewed on the appropriate standard of appellate review, the findings must be sustained.

Thus I would affirm the holding of the Court of Federal Claims that the limitations period had not accrued in 1994, and would reach the merits of the takings claim.

On the merits, I would affirm that JRS&G is not entitled to compensation for a larger land area than measured by the permit wells, for JRS&G was aware of the landfill when it took the leasehold. I would affirm the Court of Federal Claims on this ground.

No. 02-509 L

UNITED STATES COURT OF FEDERAL CLAIMS

JOHN R. SAND & GRAVEL COMPANY,
Plaintiff,

v.

THE UNITED STATES, Defendant.

October 29, 2004, Filed

COUNSEL: Jeffrey K. Haynes, Bloomfield Hills, MI, for plaintiff. L. Rider Brice, III, Bloomfield Hills, MI, of counsel.

John S. Most, with whom were Thomas L. Sansonetti, Assistant Attorney General, Susan V. Cook and Steven Bryant, Environment & Natural Resources Division, United States Department of Justice, Washington, DC, for defendant.

OPINION

HEWITT, Judge

This case is before the court following trial on plaintiff John R. Sand & Gravel Co.'s claim that the federal government violated the Fifth Amendment of the United States Constitution by physically taking plaintiff's property interest during the environmental remediation of the Metamora Landfill in Lapeer County, Michigan. First Supplemental Complaint (Supp. Compl.) ¶¶ 1, 2, 51-71.

I. Background[1]

In 1969, plaintiff John R. Sand & Gravel Co. (John R. Sand) leased from Russell and Mildred Parrish a tract of land in Metamora Township, Lapeer County, Michigan for a term of fifty years. Stipulated Facts (Stip. Facts) ¶ 1; Joint Exhibit (JX) 1 (Sand and Gravel Lease (Lease)). Plaintiff's Lease from the Parrishes included an area used as a landfill (the Landfill). See Transcript of Trial (Tr.) at 362:11-24 (Testimony of Mr. Evatz, stating that the Metamora Landfill is included within plaintiff's leasehold); Stip. Facts. ¶ 3 (stating that the northern portion of plaintiff's leasehold includes the Metamora Landfill site); see also *John R. Sand & Gravel Co.*, 57 Fed. Cl. 182, 183 n.3 (2003) (describing plaintiff's 158-acre leasehold as "rectangular in shape" with plaintiff's primary operations located in the property's center and a north-south access road just to the west of this area).[2]

Russell Parrish began operating an unregulated, open dump, known as the "Metamora Village dump" in 1955. See Defendant's Exhibit (DX) 103, at 0039779 (Deposition of Eugene L. Parrish in *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, No. 88 CV 73445 DT (E.D. Mich. May 10, 1989) [Parrish Deposition], stating that his father, Russell Parrish, began operating the Metamora Village dump in 1955); JX 5, at 01280 (United States Environmental Protection Agency, Record of Decision (1990) [1990 ROD], stating that the Landfill began in 1955 as a "privately owned, unregulated open dump"). In 1966, the dump was converted into a landfill. DX 103, at 0039779-80 (Parrish Deposition, supra); DX 71 (Mich. Dep't of Natural Res., Metamora Landfill, Lapeer County, Magnetometer Survey at 1 (1982) [Magnetometer Survey]). It was also in 1966 when the

Landfill began accepting refuse from commercial haulers, including liquid waste in fifty-five gallon drums. DX 103, at 0039780-81 (Parrish Deposition, supra). "In 1969, the landfill was upgraded to meet existing standards, and licensed to receive general refuse." JX 5, at 01280 (1990 ROD, supra). In the mid- to late-1970s, Eugene Parrish, Russell Parrish's son, took over operation of the Landfill, see DX 71 (Magnetometer Survey, supra, at 1, stating that Eugene Parrish "assumed full control of the facility operation in 1978"); DX 103, at 0039806 (Parrish Deposition, supra, stating that Eugene Parrish took over operation of the Landfill in 1974 and stopped accepting drums at the Landfill). The Landfill lost its license in 1979, DX 71 (Magnetometer Survey, supra, at 1), and closed in 1980, DX 103, at 0039905 (Parrish Deposition, supra); DX 51 at 1 (Schedule for Final Closure in In re Metamora Sanitary Landfill (Mich. Dep't of Natural Res. Sept. 17, 1980) ("Further receipt of refuse shall be terminated as of November 30, 1980.")).

Following closure of the Metamora Landfill in 1980, "several environmental site investigations were conducted, culminating in the inclusion of the site on the [EPA's] National Priorities List [pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § § 9601-9675 (2000)] on October 15, 1984." JX 57, at 0007 (Eder Associates, Metamora Landfill Site Remedial Action Close-Out Report (1994)); see also Stip. Facts ¶ 6 (stating that the EPA placed the Metamora Landfill site on its National Priority List of Hazardous Waste Sites in 1984). These investigations identified contaminants of concern (including volatile

organic compounds and polychlorinated biphenyl compounds) in buried drummed liquid and solid wastes. JX 57, at 0007 (Eder Associates, Metamora Landfill Site Remedial Action Close-Out Report (1994)). For purposes of remediation, the site was divided into two phases: Operable Unit 1 addressed drum excavation and removal, and Operable Unit 2 addressed the remediation of the rest of the site, including the Landfill and the groundwater.[3] Tr. at 1010:16-1011:14 (Testimony of Mr. Turchan). The EPA issued Records of Decision (ROD) which describe the problem and the remedy chosen for each operable unit. See Tr. at 898:12-16 (Testimony of Mr. Henry, defining a ROD as a document that provides "a description of the problem and a commitment by the EPA to have certain work performed in response to the environmental conditions at the site"). It is the remedy for Operable Unit 2 that led to construction of a perimeter fence around the Landfill site. See JX 5, at 01314 (1990 ROD, supra, calling for the "installation of fencing to restrict access to areas of the Site where certain remedial measures are to be installed"). The fence is part of the Landfill cap system, which consists of

> (a) a cap extending to approximately the edge of the waste, (b) a gradual slope from the top of the cap to permit surface water to run down and away from the landfill mass and to prevent erosion, (c) stormwater ditches and retention pond, (d) access roads, (e) site-security fence to control access, (f) installation, monitoring, and maintenance of a landfill gas venting system, and (g) implementation of access/deed restrictions.

Stip Facts. ¶ 16; see also JX 5, at 01313-14 (1990 ROD, supra, describing the selected remedy). Although the fence was moved many times, see DX 248 (Conestoga-Rovers & Associates, Current and Historical Fence Alignments, 1991-2003 at 1-2 (2004)), the May 1998 fence, which plaintiff alleges caused the physical taking of plaintiff's property interest, see Plaintiff's Brief Concerning [Expert Opinion Testimony and Accrual Date] at 10 ("The physical occupation occurred when [plaintiff] was permanently excluded from the Area of Institutional Controls portion of its leasehold. This event occurred in May 1998 when government agents installed a fence around the Area of Institutional Controls."), enclosed what is known as the "Area of Institutional Controls" (AIC).[4] See Tr. at 118:3-4, 120:11-17 (Testimony of Dr. Campbell, stating that paragraph 6(g) of JX 45 describes the AIC); JX 45 (Administrative Order Directing Compliance with Request for Access in In re Metamora Landfill Site, No. 97-C-379 ¶ 6(g) (EPA Dec. 18, 1996), describing "the area covered by the landfill cap"). The fence was relocated again in December 2003 to enclose a smaller area. Tr. at 154:24-155:23 (Testimony of Dr. Campbell); see also DX 248 (Conestoga-Rovers & Associates, Current and Historical Fence Alignments, 1991-2003 at 2 (2004)).

When plaintiff entered into the Lease with the Parrishes, in 1969, refuse had been dumped on the northern portion of the leased property for fourteen years (since 1955). The Parrishes then continued to operate the Landfill during the first eleven years of plaintiff's lease term, until 1980. In 2002, four years after the construction of the May 1998 fence, plaintiff filed suit in this court, seeking compensation for the

federal government's alleged physical taking of plaintiff's property. Supp. Compl. ¶ 1. Before this case reached trial, the parties filed two rounds of summary judgment motions. In the court's first summary judgment opinion, the court decided that plaintiff's taking claim was not time-barred (except with respect to the "areas of the property covered by permanently installed and not abandoned monitoring wells"). *John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182, 189, 193 (2003) (*John R. Sand I*). In the court's second summary judgment opinion, the court interpreted the Supreme Court's articulation of the nuisance and background principles exceptions to takings liability in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), to apply to physical takings. *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 239 (2004) (*John R. Sand II*). The court found, however, that the exceptions did not apply to the facts as then presented to the court. *Id.* at 250-51.

In the summer of 2004, the court conducted a five-day liability trial in Detroit, Michigan, during which the court heard the testimony of thirteen witnesses and admitted into evidence some 110 exhibits. Plaintiff argued that its Lease is a valid property interest; that its property interest is not encumbered by background principles of Michigan property or nuisance law, or in any other significant manner; and that a portion of its leasehold was permanently taken by defendant's actions. Plaintiff's Post Trial Brief (Pl.'s Br.) at 30-31. Defendant argued that plaintiff does not have a valid property right to mine sand and gravel, Defendant's Opening Post-Trial Memorandum (Def.'s Br.) at 23-34; that plaintiff acquired its property interest subject to

the Landfill, *Id.* at 34-43; that mining would create a nuisance and violate state law, *Id.* at 43-58, 70-78; and that defendant did no more than duplicate the result that would have been reached under background principles of state law, *Id.* at 58-70.

In addition to the trial record, the court had the opportunity to consider post-trial briefings filed by the parties. Factual findings, in addition to those described above, will be made, as necessary, in the sections that follow.

II. Discussion

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960); see also *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004) ("The purpose of [the Takings Clause] is to prevent 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978))).

The Supreme Court has recognized that the government may take private property either by physical invasion or by regulation. See *Lucas*, 505 U.S. at 1014-15 (stating that the Takings Clause was interpreted to apply only to physical takings until 1922,

when the Supreme Court stated that a regulation that goes too far will be recognized as a taking). This case involves an alleged physical taking. A physical taking occurs "when the government encroaches upon or occupies private land for its own proposed use." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001). The first step in analyzing a physical taking claim is to determine whether a claimant has a property interest. See, e.g., *Am. Pelagic Fishing Co.*, 379 F.3d at 1372 ("First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment."); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993) (stating, in a physical takings case, that "[a] taking compensable under the Fifth Amendment inherently requires the existence of 'private property.'"). The second step in a takings analysis is to determine whether a taking has occurred. See, e.g., *Am. Pelagic Fishing Co.*, 379 F.3d at 1372 ("Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest."); *Skip Kirchdorfer*, 6 F.3d at 1582 ("To recover under the *Takings Clause*, a claimant with a recognized property interest must show that its interest was 'taken.'").

A plaintiff bears an initial burden of demonstrating that a property interest exists. See, e.g., *Skip Kirchdorfer*, 6 F.3d at 1580 ("The plaintiff must show a legally cognizable property interest."). Courts look to state law "to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas*, 505 U.S. at 1030. If background principles of a state's nuisance and

property law bar a property owner from using land in a certain way, then the *Takings Clause* does not require compensation for an alleged taking to abate that use. *Id.* at 1031-32. To resist compensation under this theory, "[the defendant] must identify background principles of nuisance and property law that prohibit the uses [the plaintiff] now intends in the circumstances in which the property is presently found." *Id.* at 1031. If a defendant can show such an inherent limitation in the plaintiff's title, then nothing is taken. *Id.* at 1031-32.[5]

The court examines plaintiff's taking claim within the framework set out by the court's prior opinion in *John R. Sand II*:

> First, plaintiff must demonstrate that it possesses a property interest. Second, defendant must identify background principles of Michigan property or nuisance law that would prohibit the use of the land plaintiff intends. This step involves determining the relevant contours of Michigan property and nuisance law. Third, defendant must connect the state law to the facts of this case to show, for example, that the exercise of plaintiff's claimed property rights would be a nuisance and that actions by the government of which plaintiff complains are actions that could be taken under Michigan law to abate the nuisance.

60 Fed. Cl. at 240. After completing this analysis, if the court finds plaintiff possesses a property interest, then the court must determine whether that interest was taken. See *Skip Kirchdorfer*, 6 F.3d at 1582 ("To

recover under the Takings Clause, a claimant with a recognized property interest must show that its interest was 'taken.'"). The court turns first to the question of whether plaintiff possesses a property interest.

A. Whether Plaintiff Possesses a Compensable Property Interest

Federal courts look to state law to "define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas*, 505 U.S. at 1030; see also *McKay v. United States*, 199 F.3d 1376, 1381 (Fed. Cir. 1999) ("The trial court was correct to look to [state] law to determine if . . . there was a property right that could be violated, since the Fifth Amendment protects rather than creates property interests."). Plaintiff argues that plaintiff's leasehold is an interest in real property. Pl.'s Br. at 4. Defendant argues that because, at the time of the alleged taking, plaintiff did not possess the necessary Metamora Township permits to mine in the AIC as required by its Lease and because mining would be illegal anywhere on the property, plaintiff does not have a valid property right. Def.'s Br. at 23, 29.

1. Accrual Date of Taking Claim

Before determining whether plaintiff possesses a property interest under Michigan law, however, the court must first determine when plaintiff's taking claim first accrued because the scope of plaintiff's property interest is determined at the moment prior to that date.[6] Although the parties agree that plaintiff's taking claim accrued in May 1998, see Plaintiff's Brief Concerning [Expert Opinion Testimony and Accrual Date] at 7 (arguing that May 1998 is the date when

plaintiff was completely and permanently excluded from the AIC); Defendant's Special Briefing in Response to the Court's Order of July 7, 2004, at 3 ("It appears that it was not until May 1998 . . . that plaintiff was clearly and permanently excluded from the AIC."), the date of first accrual of a takings claim is a matter of law, see *Banks v. United States*, 314 F.3d 1304, 1307-08 (Fed. Cir. 2003) (stating that the appellate court reviews matters of law de novo and applying that standard to the trial court's decision to dismiss a takings claim as time-barred, which requires analysis of when the claim first accrued).

The Supreme Court has stated that, in the case of a physical taking, the act of the government entering into possession of the property constitutes the act of taking. *United States v. Dow, 357 U.S. 17*, 22, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958). The Court has also stated that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). A physical occupation is "a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of the property." *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002). The date on which a property interest is "clearly and permanently taken" is the "key date for accrual purposes." *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000). Thus, plaintiff's taking claim first accrued when it became clear that the government was permanently and exclusively occupying the portion of plaintiff's leasehold alleged to have been taken.

The court finds that plaintiff's taking claim accrued in May of 1998, when defendant's agents completed relocation of a perimeter fence around the AIC. See JX 25 (Letter from Campbell to Haynes of 5/12/98, stating that "relocation of sections of the Site security fence has been completed"). Prior to that time, ongoing access disputes prevented defendant from permanently and exclusively occupying the AIC.[7] The government's action, through its representatives, in completing the fence relocation in May 1998 extinguished plaintiff's right to possess, use, and dispose of its property interest. See *Loretto*, 458 U.S. at 435 ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945))). The May 1998 fence permanently and absolutely excluded plaintiff from the AIC. See Stip. Facts ¶ 20 (stating that the May 1998 fence "completely excluded plaintiff from the [AIC]"); see also *Loretto*, 458 U.S. at 435 n.12 (stating that "the permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude"). Because plaintiff's taking claim accrued in May 1998, it is as of this date that the court evaluates the scope of plaintiff's property interest.

2. Whether Plaintiff Complied with Lease

Plaintiff's claimed property interest arises from its Lease.

The Lease of approximately 158 acres of land in Lapeer County, Michigan for a term of fifty years (from August 1, 1969). See JX 1 (Lease ¶¶ 1-2); Tr. at 362:8-10 (Testimony of Mr. Evatz regarding the size of the leasehold estate). The lessors own the property in fee

simple absolute. See JX 1 (Lease ¶ 5, stating, "The parties of the first part covenant and warrant that they are the owners of the above described premises in fee simple and absolute . . . .").[8] The land was

> leased to the exclusive use of [John R. Sand] for the purpose of stripping the land, taking out and removing therefrom the marketable stone and sand, which is, or which may hereafter be found on, in or under said land, together with the right to construct or build, and to make all excavations, pits openings, ditches, roadways and other improvements upon the said premises, which are or may become necessary or suitable for removing sand and stone from the said premises.

JX 1 (Lease ¶ 1). Paragraph seven of the Lease provides that John R. Sand "agrees to operate its mining operations according to the Zoning Ordinance for the Township of Metamora and according to all conditions as required in a Gravel and Sand Mining Permit as issued by the Township of Metamora, Lapeer County, Michigan." JX 1 (Lease ¶ 7). Paragraph nine of the Lease provides for automatic cancellation of the Lease "should [John R. Sand] fail to remove any sand or stone from the premises and fail to make payment . . . for a twelve (12) month period." JX 1 (Lease ¶ 9).

Under Michigan law, "a leasehold and rights derived from a leasehold[] constitute 'property,' for the taking of which just compensation must be made or secured." *Lookholder v. State Highway Comm'r*, 91 N.W.2d 834, 838, 354 Mich. 28 (Mich. 1958) (citations omitted); see also *United Coin Meter Co. v. Gibson*, 109 Mich. App.

652, 311 N.W.2d 442, 444 (Mich. Ct. App. 1981) (stating that a lease agreement transfers to the tenant a possessory estate (citing *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N.W. 338 (1899))). "A lease . . . gives the tenant possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease." *United Coin Meter Co.*, 311 N.W.2d at 444. Additionally, unsevered sand and gravel is real estate. See *Rolland Township v. Pakes*, 226 Mich. 284, 197 N.W. 525, 526-27 (Mich. 1924) (reporting the finding of the circuit judge that "gravel in a pit unremoved is real estate" and later stating that "when the gravel was severed and removed, it was not real estate"). Because plaintiff possesses a property interest recognized under Michigan law and because "'every sort of [real property] interest the citizen may possess' counts as a property interest under the Fifth Amendment," *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945)), the court finds that plaintiff possesses a type of property interest that is compensable under the Fifth Amendment.

Defendant argues, however, that the Lease is no longer in effect because plaintiff failed to comply with it. The parties agree that paragraph nine of the Lease requires plaintiff either to remove sand or stone or to pay royalties at least once per year. See Defendant's Post-Trial Reply Memorandum (Def.'s Resp. Br.) at 29 ("Paragraph 9 of the lease requires that John R. Sand remove sand or stone from the premises or pay royalties at least once a year."); Pl.'s Br. at 7 n.3 ("The lease will not be cancelled if plaintiff removes sand or stone or pays royalties."). The court agrees with the

parties' interpretation of paragraph nine. The parties disagree about whether plaintiff has complied with the requirements of paragraph nine. Compare Def.'s Resp. Br. at 29 (arguing that the "evidence does not demonstrate" that plaintiff has complied with paragraph nine) with Pl.'s Br. at 7 ("Plaintiff has fulfilled its lease obligations to either remove sand or stone from the leasehold or pay the landlord."). The 1992-1993 time frame is the focus of this dispute. See Def.'s Resp. Br. at 30 (referring to plaintiff's 1992 and 1993 corporate filings and Mr. Evatz's visit to the leasehold site in 1992); Pl.'s Br. at 7 & n.4 (same).

The parties have pointed to three types of evidence that bear on the question of whether plaintiff has complied with paragraph nine of its Lease. Plaintiff points to plaintiff's yardage book (Yardage Book). Pl.'s Br. at 7. Defendant points to witness testimony regarding visits to the leasehold site in the early 1990s and to plaintiff's 1992 and 1993 corporate filings. Def.'s Resp. Br. at 29-30.

Plaintiff's president, Mr. Evatz, testified that the Yardage Book "keeps track of the yardage of material that we sell, so that we can pay Parrish's royalty." Tr. at 496:21-23. The Yardage Book covers the 1981-2004 time period. Tr. at 497:2-4 (Testimony of Mr. Evatz); see also Plaintiff's Exhibit (PX) 50 (Yardage Book). Plaintiff argues that plaintiff's Yardage Book is the "best evidence of its operations." Pl.'s Br. at 7 n.4. Defendant disagrees and attacks the reliability of the Yardage Book by pointing to Mr. Evatz's testimony. Def.'s Resp. Br. at 29-30. Defendant first draws the court's attention to Mr. Evatz's testimony that he removed two yards of "gravel" in August of 1992. Def.'s Resp. Br. at 30; see also Tr. at 390:21-22, 504:4-5

(testimony of Mr. Evatz, stating that he removed two cubic yards of gravel). Defendant points out that the Yardage Book indicates that two cubic yards of sand, not gravel, were removed. Def.'s Resp. Br. at 30; see also PX 50, at 20215 (Yardage Book, reflecting that the "2" entry for August 5, 1992 appears in the "Sand" column). However, Mr. Evatz explained that the only product that is recorded in the "Stone" column in the Yardage Book is "6A," which is used for making concrete. Tr. at 504:6-9. The column labeled "Sand" is for all other products, such as sand, pea pebbles and 60/40 road gravel. Tr. at 504:10-11. Mr. Evatz further explained that the royalty agreement dictated this division. Tr. at 504:7-12. Paragraph three of the Lease states that John R. Sand & Gravel Company is to pay the Parrishes "ten cents (.10[cent]) per yard for the sand and pea pebbles and (15[cent]) per yard for the stone." JX 1 (Lease ¶ 3). The court credits Mr. Evatz's explanation of the apparent discrepancy between his testimony and the Yardage Book and does not view the discrepancy as impugning the reliability of the Yardage Book.

Second, defendant argues that the two payments indicated in the Yardage Book for the August 1992 period "appear to be in different handwriting[,] yet, Mr. Evatz testified that he made the August 1992 entry himself." Def.'s Resp. Br. at 30; see also Tr. at 508:211 (testimony of Mr. Evatz stating that he made the entries in the Yardage Book). Defendant presented no trial testimony regarding whether the entries for the August 1992 payments were in the same handwriting. Defense counsel is neither an expert qualified to opine regarding handwriting nor a lay person familiar with Mr. Evatz's handwriting. Cf. *United States v. Mooney*,

315 F.3d 54, 61-63 (1st Cir. 2002) (upholding the district court's decision to admit the testimony of a handwriting expert under Federal Rule of Evidence 702); *United States v. Barker*, 735 F.2d 1280, 1283 (11th Cir. 1984) (upholding the district court's decision to admit the testimony of two lay witnesses who were familiar with defendant's handwriting regarding their opinion of whether defendant's handwriting appeared on traveler's checks under Federal Rules of Evidence 701 and 901(b)(2)). The court does not find that defendant's unsupported assertion provides any reason to question the reliability of plaintiff's Yardage Book.

Third, defendant points to certain extrinsic evidence-site visits in the early 1990s and corporate filings-to assail the reliability of plaintiff's Yardage Book. Def.'s Resp. Br. at 29-30. Two witnesses testified that when they visited the Metamora Landfill site in the early 1990s the mining operation was inactive. See Tr. at 201:13-18 (Testimony of Dr. Campbell, stating that when he visited the site in the spring of 1992, he "didn't see any signs of activity"); Tr. at 1020:14-22, 1031:3-8 (Testimony of Mr. Turchan, stating that when he visited the site in April 1990, his "initial impression was that it was an inactive [mining] operation"). Plaintiff's 1992 and 1993 corporate filings characterize plaintiff's business as an "inactive" sand and gravel pit. DX 14, at 000012, 000014. The court does not find the testimony of the site visitors or the statement in corporate filings to be dispositive with respect to whether plaintiff removed sand or gravel or paid royalties within any given twelve-month period. The payment of royalties could occur even if a mining operation were inactive. The Lease does not specify what quantity of sand or gravel had to be removed from

the premises. A small amount of sand or gravel could have been removed from the premises without activating the mining operation. And, in fact, the testimony of plaintiff's president supports this conclusion. Mr. Evatz testified that when he became president of John R. Sand in 1992, he went to the leasehold site and removed and sold two yards of sand to keep the Lease open. Tr. at 355:24-356:1, 390:18-22. He testified that he recorded this transaction in the Yardage Book. Tr. at 504:13-21, 508:1011; PX 50, at 20215 (Yardage Book).

Because the court credits plaintiff's testimony with respect to the removal and sale of sand in 1992, the court finds, consistent with the business record contained in the Yardage Book, that plaintiff's Lease was not terminated by non-compliance with the obligation to mine or pay royalties. See Def.'s Resp. Br. at 29 (acknowledging that "the Yardage Book appears to contain entries suggesting that plaintiff fulfilled the requirements of ¶ 9"); Pl.'s Br. at 7 (arguing that testimony demonstrates that "plaintiff has fulfilled its lease obligations to either remove sand or stone from the leasehold or pay the landlord").

3. Whether State and Local Mining Permits are Necessary to Establish Property Interest

Defendant argues that, in May 1998, plaintiff was not in compliance with Metamora Township zoning ordinances, did not possess a permit to mine from Metamora Township, did not possess a Soil Erosion and Sedimentation Control permit from Lapeer County, did not possess a groundwater discharge permit from the state of Michigan, Def.'s Br. at 23-34, and that plaintiff's "lack of state and local permits renders its property

interest uncompensable," Def.'s Resp. Br. at 32 (emphasis omitted). This is because plaintiff's Lease grants it only the right to mine sand and gravel. Def.'s Br. at 23; JX 1 (Lease ¶ 1). Defendant's argument is that if, under state and local law, plaintiff cannot mine sand and gravel, then the government, by excluding plaintiff from the AIC, has not taken anything from plaintiff. See Def.'s Br. at 29 ("John R. Sand does not [possess] the necessary local permission to undertake the use of its property-mining in the AIC-that it complains has been taken. Accordingly, plaintiff's exclusion [from] the AIC has not deprived it of a right otherwise enjoyed under the terms of its lease.").

Defendant cites a number of cases to support its argument. Def.'s Br. at 29 (citing *United States v. Hill*, 896 F. Supp. 1057 (D. Colo. 1995); *City Nat'l Bank v. United States*, 33 Fed. Cl. 224 (1995); *Plantation Landing Resort, Inc. v. United States*, 30 Fed. Cl. 63 (1993)); Def.'s Resp. Br. at 31 (citing *United States v. Willow River Power Co.*, 324 U.S. 499, 89 L. Ed. 1101, 65 S. Ct. 761, 103 Ct. Cl. 797 (1945)). Plaintiff argues that these cases "deal with instances where the plaintiff could only obtain its property interest via the permit in question." Plaintiff's Response to Defendant's Post Trial Memorandum (Pl.'s Resp. Br.) at 8. The court finds the *City National Bank* case most closely analogous to the present facts.

In *City National Bank*, the court stated that the issue before it was "whether a landowner seeking damages for a taking of his property must take into account existing state and county regulatory restrictions concerning limerock mining when valuing the property prior to the date on which the [federal government] denied a permit necessary to develop the

property for mining." 33 Fed. Cl. at 225. The court noted that the plaintiff possessed a "compensable property interest." *Id.* at 232 n.12. The court did not reach a conclusion on the issue of valuation and stated that if the defendant could establish that the plaintiff could not obtain a permit to mine limerock, "plaintiff's takings claim must fail, because there would be no diminution in the value of the property as of the date of the alleged taking attributable to actions of the Federal Government." 33 Fed. Cl. at 233. In the court's next decision in *City National Bank*, the court found that,"prior to the [federal government's] permit denial, plaintiff could not mine limerock." *City Nat'l Bank v. United States*, 33 Fed. Cl. 759, 764 (1995). Thus, the federal government's denial of the permit, "which admittedly disabled plaintiff from mining limerock, did not affect the value of the property." *Id.* The court granted defendant's motion for summary judgment because "ruling that plaintiff cannot establish the value of his property for mining limerock as of the date of taking forecloses any monetary recovery." *Id. at 764 n.5.* The court's discussion of the effect of local regulations, and specifically plaintiff's inability to mine limerock under local regulations, on plaintiff's taking claim pertained only to the valuation of plaintiff's property interest. See *id.* ("The court notes that this order solely addresses the issue of valuation.").

The other cases cited by defendant address whether the claimant possessed a property interest. In *Willow River Power Co.*, the Supreme Court stated that the issue before the court was whether a property right existed. See 324 U.S. at 502-03 ("We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is

really the question to be answered."). In holding that no property right existed, the Court stated that "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them." *Id.* at 502, 511.

In *Plantation Landing Resort*, the court found that, because the plaintiff did not possess a "compensable interest" with respect to land below the mean high water mark, it could not proceed with a takings claim with respect to that land. 30 Fed. Cl. at 68. Defendant here reads the requirement that a claimant have a "compensable property interest" into the court's statement that, "by not renewing the permit, plaintiff extinguished its compensable interest." See Def.'s Br. at 29 (quoting *Plantation Landing Resort* as support for the proposition that "a plaintiff must establish the existence of a compensable property interest"). The court's discussion, the facts of the case, and Louisiana law demonstrate, however, that the court required that plaintiff possess a property interest, not a "compensable property interest."

In setting out the legal standard for a takings claim, the court in *Plantation Landing Resort* stated that "before a party can recover just compensation under the Fifth Amendment for a taking . . . it must establish a compensable property interest." 30 Fed. Cl. at 67. The next sentence of the court's opinion reads, "'It is clear that only the owner of the property at the time of the taking is entitled to be compensated for the taking.'" *Id.* (quoting *Lacey v. United States*, 595 F.2d 614, 619, 219 Ct. Cl. 551 (Ct. Cl. 1979)). The court thus equated a "compensable property interest" with property ownership and found that the plaintiff did not own the property alleged to have been taken. Under Louisiana

law, it appears that title to land passes to the state when the land erodes and navigable water covers it. See La. Civ. Code Ann. art. 450 (West 1980) ("Public things that belong to the state are . . . bottoms of natural navigable water bodies . . . ."); La. Rev. Stat. Ann. § 9:1151 (West 2004) (referring to a "change" in "ownership" of land or water bottoms as a result of water changing its course or eroding land and setting out the obligation of the "new owner," including the state of Louisiana, with respect to already existing mineral leases). The original landowner may reclaim the land by obtaining a permit to do so. La. Rev. Stat. Ann. § 41:1702 (West 2004). Thus, in *Plantation Landing Resort*, the state owned the property alleged to have been taken and the plaintiff had no property interest in that land.

In *Hill*, the court concluded that because the plaintiff "had no arguably vested property right to sell the animal parts when he received them[,] . . . he has lost no right for which he can claim he is owed compensation." 896 F. Supp. at 1063. The court noted that the plaintiff could have sold the animal parts if he had obtained a permit. *Id.* Had plaintiff possessed a permit, he would have had a vested property right to sell the animal parts. However, plaintiff's lack of a permit precluded a finding that the plaintiff possessed a property interest.

The court believes that, in this case, defendant's argument regarding plaintiff's possession, or lack thereof, of state and local permission to mine is best characterized as a damages argument. Indeed, in defendant's post-trial response brief, defendant clarified that it is not arguing that plaintiff's property interest has been voided by the lack of permits (or that

plaintiff's Lease has been breached), but that the lack of permits renders plaintiff's property interest uncompensable. Def.'s Resp. Br. at 31-32. The trial, and this opinion, are limited to the issue of liability.

4. Whether Plaintiff's Lease is Subject to the Landfill

Defendant argues that "plaintiff acquired its property interest subject to the landfill," and, "to the extent the landfill now prevents plaintiff from mining sand and gravel in the AIC, plaintiff has consented to that restriction on its property interest." Def.'s Br. at 34. Defendant states that the Landfill was in existence when plaintiff acquired the Lease and that the Landfill and plaintiff's sand and gravel mining operations were coordinated enterprises. *Id.* at 34-36. Defendant contends, based on plaintiff's acquiescence to the deposition of refuse on a portion of plaintiff's leasehold, that plaintiff "allowed a nuisance to be created upon its own property" and "allowed the nuisance to continue and to grow on sand and gravel over which [plaintiff] had possession and control." *Id.* at 37.[9] Defendant argues that plaintiff's conduct contributed to plaintiff's loss of sand and gravel, estops plaintiff from claiming a taking and waives plaintiff's right to object to state-imposed restrictions on the closure of municipal landfills. *Id.* at 40-41.

This argument appears to be presented for the first time in defendant's post-trial briefing. Although plaintiff raised no objection to defendant's argument, the court addresses the propriety of raising a new legal argument in post-trial briefing. Rule 15(b) of the Rules of the United States Court of Federal Claims states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

RCFC 15(b). Rule 15(b) is to be "liberally construed." *Tucker v. United States*, 8 Cl. Ct. 575, 586 (1985); see also *Laningham v. United States*, 5 Cl. Ct. 146, 156 (1984) ("The courts have generally accorded Rule 15(b) a liberal construction, so as to enable controversies to be tried on the merits."). "An absolute minimum requirement before Rule 15(b) can be invoked after trial has been that evidence must have been introduced at trial pertaining to the factual issue(s) implicit in the new claim." *Laningham*, 5 Cl. Ct. at 156. This court's predecessor has found that the substantially similar prior version of Rule 15(b) "allowed the court to treat the pleadings as though amended in order to conform to the proof" where a defense was not affirmatively plead, a procedure preferred by the prior version of Rule 8(c), but was "effectively tried with mutual consent of the parties." *Technical Dev. Corp. v. United States*, 202 Ct. Cl. 237, 243 (1973); see RCFC 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . waiver, and any other matter constituting an avoidance or affirmative defense.").

The court finds that the defense that plaintiff acquired its Lease subject to the Landfill was tried by the implied consent of the parties. Evidence regarding the factual predicate of the defense was presented at trial. Defendant's failure to make a motion to amend its pleadings to conform to the evidence does not affect the result of the trial on this issue.

Plaintiff contests each of defendant's arguments. Pl.'s Resp. Br. at 16-19. Plaintiff's primary argument is that plaintiff did not know that hazardous material was being dumped at the Landfill and "mere knowledge that waste of some kind is deposited in the landfill does not rise to perpetrating or allowing a continuing nuisance." Pl.'s Resp. Br. at 19. Plaintiff states that "at no time did plaintiff have any control or ownership interest in the landfill operation" and that its Lease "did not grant any rights or responsibilities in the landfill operation." *Id.* at 18-19. Plaintiff adds that "even if plaintiff had some knowledge of hazardous materials being deposited at a landfill it has no control over, defendant has not cited any law to suggest that this knowledge somehow acts to waive plaintiff's constitutional rights." *Id.* at 19. Plaintiff also argues that it did not participate in the Landfill operation. *Id.* at 16.

While the court heard the testimony of thirteen witnesses, it was the testimony of Edward W. Evatz, Jr., the current president of John R. Sand & Gravel Company, Tr. at 355:8-356:1, that proved to be the most illuminating on the issue of plaintiff's relation to the Landfill. Mr. Evatz testified that when the Lease was entered into, in 1969, the Landfill already existed on the leasehold property, Tr. at 469:13-17, and that, at that time, his father was aware of the Landfill operation, Tr. at 470:4-7. Additionally, when Mr. Evatz was first on

the leasehold property in 1970, Tr. at 468:3-4, he was aware of the Landfill operation because his father had told him about it, Tr. at 470:8-17.

Although Mr. Evatz testified that there were no informal agreements between John R. Sand and Russell Parrish, Tr. at 470:18-25, the evidence indicates that John R. Sand and the Landfill operation cooperated with each other. Mr. Evatz testified that both Russell Parrish and Eugene Parrish, his son, Tr. at 471:17, alerted Mr. Evatz to areas of the Landfill property that might be good for sand and gravel mining. Tr. at 471:2-8. When so alerted, Mr. Evatz would send John R. Sand's trucks to the area indicated and the Parrish operation would load John R. Sand's trucks with the sand and gravel. Tr. at 471:10-15.

This mutually beneficial arrangement is characterized by Mr. Evatz's testimony that "on different occasions" Mr. Parrish "would come by and say, hey, we found some . . . good gravel, you want me to load your trucks up? And I'd say, sure. So we'd send the trucks back to wherever he found it, and they'd load the trucks up and that'd free up a crane operator." Tr. at 471:10-15. Specifically, Mr. Evatz agreed that this arrangement was a "good deal" because it "freed up [a crane] operator" for plaintiff. Tr. at 478:1-8. Mr. Evatz testified that from 1972-1976, John R. Sand was mining to the east of the Landfill, Tr. at 373:15-21, 477:14-478:1; see also PX 59 (Map indicating locations and time frames of John R. Sand's mining activities), and that the goal was to get the gravel to the east of the Landfill out of the ground before the Landfill expanded to the eastern lot line, Tr. at 375:3-8, 478:1-3. As John R. Sand dug out the gravel to the east of the Landfill, the Landfill operators "could just dump the garbage in the

hole that [John R. Sand] produced." Tr. at 375:3-8. Mr. Evatz further testified that, in 1974, John R. Sand mined sand and gravel in an area that was "near or . . . in" an area that later became a drum disposal area. Tr. at 551:19-552:18; PX 59 (Map indicating locations and time frames of John R. Sand's mining activities).

Plaintiff allowed the Landfill operation to continue on plaintiff's leasehold despite plaintiff's own understanding of its Lease that John R. Sand was "allowed to mine the entire property," Tr. at 364:4-8, and that John R. Sand's right to mine the property is exclusive in that it would preclude any other uses of the property, Tr. at 365:1-13. Plaintiff, in fact, successfully asserted this understanding of the Lease in litigation with County Transfer Stations, Inc. County Transfer Stations sued John R. Sand for interfering with its business. *County Transfer Stations, Inc. v. John R. Sand & Gravel Co.*, 2003 Mich. App. LEXIS 2810, No. 236611, 2003 WL 22495581, at *2 (Mich. Ct. App. Nov. 4, 2003). The Michigan court found that County Transfer Stations' "use and ownership of its property was clearly subject to [John R. Sand's] mining lease." 2003 Mich. App. LEXIS 2810, [WL] at *3. The court further stated that John R. Sand had no obligation to accommodate County Transfer Stations' business. *Id.* John R. Sand, likewise, had no obligation to accommodate the Metamora Landfill operation, yet the evidence clearly shows that it did so. John R. Sand both allowed the Landfill to operate on the northern portion of its leasehold property and cooperated with the Landfill operation to its own benefit.

Mr. Evatz testified that he saw trucks dumping barrels into the Landfill on two occasions in the 1970s. Tr. at 479:22-480:13, 1362:21-1363:3. When the state

began investigating the drums, Mr. Evatz met with Lt. Gregory Eagle and pointed out areas where drums had been buried. Tr. at 483:9-17 (Testimony of Mr. Evatz). The Michigan Department of Natural Resources[10] estimated that "as many as 35,800 drums could be buried" at the site. DX 71 (Magnetometer Survey, supra, at 6). These drums were buried on the site from approximately 1966 to the mid- to late-1970s. See DX 103, at 003978081, 0039806 (Parrish Deposition, supra, stating that the Landfill began accepting drums in 1966 and accepted them until Eugene Parrish took control of the facility in 1974). Mr. Evatz testified that between 1970 and 1985 he was at the leasehold site on a daily basis. Tr. at 379:16-23; see also Tr. at 1364:19-22 (Testimony of Mr. Evatz, stating that he was at the leasehold site "most of the time" in the 1970-1985 time period). Mr. Evatz was thus at the leasehold site on a daily basis for approximately four of the approximately eight years when drums were being buried at the site. Having had the opportunity to observe the demeanor of Mr. Evatz and, given his testimony demonstrating his subsequent ability to identify areas where drums were buried, Tr. at 483:16-17, the court finds that it strains credulity that Mr. Evatz observed trucks dumping barrels on only the two occasions to which he testified. Whether Mr. Evatz observed the dumping of barrels once, twice, or many times, however, John R. Sand's regular cooperation in activities to develop the Landfill provides a sufficient basis for charging plaintiff with knowledge of, acquiescence in, and cooperation with an activity occurring on its leasehold that could potentially interfere with its leasehold rights.

Plaintiff acquired its Lease with full knowledge that a landfill existed on the northern portion of its

leasehold. Plaintiff's sand and gravel mining business cooperated with the Landfill operation. Under plaintiff's Lease, plaintiff could have shut down the Landfill operation at any time, but did not do so.

Defendant cites *Chancellor Manor v. United States*, 331 F.3d 891, 905 (Fed. Cir. 2003), and *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 70 L. Ed. 2d 738, 102 S. Ct. 781 (1982), to support the proposition that "plaintiff should [be] barred from seeking compensation for 'lost' sand and gravel when [plaintiff's] own conduct, both directly and indirectly, contributed to the loss of that sand and gravel." Def.'s Br. at 40. *Chancellor Manor* was a regulatory taking case in which the Federal Circuit applied the analysis of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). *Chancellor Manor*, 331 F.3d at 901, 903. Plaintiffs argued that they did not cause the problem that the legislation that was the alleged source of the taking sought to address, so it would be unfair for them to bear the burden of solving the problem. *Id.* at 905. Although the court did not have a sufficient record before it to render a decision on this issue, the court did state that "it is pertinent whether the party seeking compensation has created or contributed to the problem the government seeks to solve." *Id.* While *Chancellor Manor* was a regulatory takings case, the court's comment regarding whether the party seeking compensation created or contributed to the problem addressed by the regulation occurred in a larger discussion of the character of the government action factor of the Penn Central analysis. *Id.* at 904-05. In a physical takings case, "'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is

determinative." *Loretto*, 458 U.S. at 426. Thus, in a physical takings case, whether the party seeking compensation has created or contributed to the problem the government seeks to solve by physically occupying the claimant's property is relevant to the takings analysis. In this case, John R. Sand's own actions (allowing the Landfill operation to continue on its property and cooperating with the Landfill operation) contributed to the problem (a landfill encompassing a hazardous waste site) that the government sought to solve by remediating the site and, in the process of remediation, excluding plaintiff from a portion of its leasehold.[11]

In addition to *Chancellor Manor*, two Federal Circuit cases in which property was taken during the investigation and remediation of a hazardous waste site are instructive by contrast. In *Hendler v. United States*, owners of property near a hazardous waste site brought a takings claim against the federal government for the installation and monitoring of groundwater monitoring wells on their property. 952 F.2d 1364, 1369-70 (Fed. Cir. 1991). The Federal Circuit held that the government physically took the owners' property. *Id.* at 1377. There is no indication in any of the trial court or appellate court decisions that the property owners contributed in any way to the creation of the hazardous waste site. See, e.g., *Hendler v. United States*, 175 F.3d 1374, 1383 (Fed. Cir. 1999) (stating that the owners of the hazardous site, the State of California and users of the site were held liable for clean-up costs); *Hendler v. United States*, 36 Fed. Cl. 574, 576-77 (1996) (stating that the *Hendler* owners first acquired the neighboring property in 1960 and "planned to hold the property until economic conditions favored commercial development").

McKay v. United States, 199 F.3d 1376 (Fed. Cir. 1999), is "factually similar" to *Hendler*. 199 F.3d at 1381. In *McKay*, the plaintiffs owned a mineral estate and the government owned the overlying surface rights. *Id.* at 1378. The overlying estate was designated a "Hazardous Substance Site" and the government installed groundwater monitoring wells that extended into the plaintiffs' mineral estate without the plaintiffs' consent. *Id.* The Federal Circuit found that the trial court's granting of "summary judgment for the government of no liability was not warranted." *Id.* at 1382. As in *Hendler*, there was no indication that the plaintiffs contributed in any way to the creation of the hazardous waste site. See *Id.* at 1378 (stating that the Department of Energy sprayed waste onto the overlying estate and that the Department of Energy, EPA, and the Colorado Department of Public Health and Environment entered into a consent decree to investigate and remediate the site).

In both *Hendler* and *McKay*, innocent landowners were able to recover where their land was taken in order to investigate and monitor a neighboring (Hendler) or contiguous overlying (McKay) hazardous waste site. That is not the case here. John R. Sand permitted the Landfill to exist on its own leasehold, coordinated landfilling activities with the Landfill operators, and observed barrels containing hazardous materials being dumped on the leasehold property. Even if, as plaintiff argues in post-trial briefing but did not directly testify to, plaintiff did not know that the barrels contained hazardous materials, Pl.'s Resp. Br. at 19 (citing Mr. Evatz' testimony that he "couldn't see what was inside [drums being dumped on the leasehold]," Tr. at 480:4-6), plaintiff's participation in

the Landfill operation and acquiescence in its presence on its leasehold preclude a finding that plaintiff is an innocent landowner in the position of the plaintiffs in *Hendler* and *McKay*. Had the plaintiffs in *Hendler* and *McKay* not prevailed, they would have been forced to bear a burden that was neither created nor acquiesced in by them. Here, if plaintiff prevails, plaintiff would shift a burden that plaintiff participated in creating onto the public as a whole.

Justice and fairness do not require that the community at large bear the burden of plaintiff's inability to mine a portion of its leasehold when plaintiff contributed to the circumstances causing the loss of the right to mine. In *Agins v. Tiburon*, the Supreme Court stated that "the determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). The Supreme Court has also stated that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; see also *Am. Pelagic Fishing Co.*, 379 F.3d at 1371 ("The purpose of [the Takings Clause] is to prevent 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Penn Central Transp. Co.*, 438 U.S. at 123)). Plaintiff's contribution to the creation of a landfill containing a hazardous waste site makes the loss of a portion of plaintiff's property during the remediation of that site a burden which it is fair to allow plaintiff to

bear, rather than shifting plaintiff's loss to the public as a whole. The court finds that fairness and justice do not require compensation to plaintiff in these circumstances.

While the foregoing determination that plaintiff's property interest is noncompensible under equitable principles defeats plaintiff's claim in its entirety, the court, in the interest of judicial economy and efficiency, now addresses the remaining issues disputed at trial. Those issues involve the government's defense based on background principles of state law which would bar plaintiff from mining in the AIC.

B. Whether Background Principles of Michigan Law Prohibit Mining in the Area of Institutional Controls

"If background principles of a state's nuisance and property law prohibit the uses a plaintiff intends, then no taking has occurred." *John R. Sand II*, 60 Fed. Cl. at 239. In *Lucas*, the Supreme Court treated regulations that prohibit all economically beneficial use of land similarly to physical occupations, stating:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State

> under its complementary power to abate nuisances that affect the public generally, or otherwise.

505 U.S. at 1029. Thus, the defendant in a takings case bears the burden of identifying the background principles and proving that they apply to the factual circumstances of the case. *Id.* at 1031.

In applying the background principles exception, *Lucas* instructed that a court must look at the intended use of land and the land in its current condition to determine whether background principles would prohibit the intended use. See 505 U.S. at 1031 ("[The defendant] must identify background principles of nuisance and property law that prohibit the uses [the plaintiff] now intends in the circumstances in which the property is presently found." (emphasis added)). The Court further stated that the "inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities." *Id.* at 1030-31.

Not all background principles of state law are robust enough to fit within the Lucas background principles exception. See, e.g., *K & K Constr., Inc. v. Dep't of Natural Res.*, 217 Mich. App. 56, 551 N.W.2d 413, 417 (Mich. Ct. App. 1996) (finding that a state constitutional provision declaring natural resource conservation "'to be of paramount public concern'" and "the generalized invocation of public interests in the . . . Legislature's declarations in . . . the Michigan Environmental Protection Act do not constitute background principles of nuisance and property law

sufficient to prohibit the use of plaintiffs' land without just compensation" (citations omitted)), *rev'd on other grounds*, 456 Mich. 570, 575 N.W.2d 531 (Mich. 1998).

1. Applicable Michigan Law

Common law nuisance, as defined by Michigan law, encompasses activity causing significant harm to common rights enjoyed by the public, or significant interference with rights of private property owners to the use and enjoyment of their land. A long line of Michigan cases teaches that activities proscribed by laws enacted to protect the public health, safety, and welfare are presumed to cause significant harm to the public and are thus presumed to be nuisances. Accordingly, the court next examines the background principles of Michigan nuisance law.

Under Michigan law, a nuisance may either be private[12] or public. To prevail under theories of either private or public nuisance, "a plaintiff must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of property." *City of Jackson v. Thompson-McCully Co.*, 239 Mich. App. 482, 608 N.W.2d 531, 537 (Mich. Ct. App. 2000); see also Restatement (Second) of Torts § 821F (1979) ("There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."). Where the injury has not yet occurred, the nuisance is anticipatory. See *Thompson-McCully Co.*, 608 N.W.2d at 537 (referring to an "anticipatory nuisance" as one where the harm has not yet occurred and is only "threatened or anticipated" (internal citation omitted)). A party claiming that an anticipatory

nuisance[13] exists must show that the occurrence of injury or harm is more than conjectural:

> Equity will not enjoin an injury which is merely anticipated nor interfere where an apprehended nuisance is doubtful, contingent, conjectural or problematical. A bare possibility of nuisance or a mere fear or apprehension that injury will result is not enough. On the other hand, an injunction may issue to prevent a threatened or anticipated nuisance which will necessarily result from the contemplated act, where the nuisance is a practically certain or strongly probable result or a natural or inevitable consequence.

Falkner v. Brookfield, 368 Mich. 17, 117 N.W.2d 125, 128 (Mich. 1962); see also *Plassey v. S. Loewenstein & Son*, 330 Mich. 525, 48 N.W.2d 126, 128 (Mich. 1951) ("'Equity, as a rule, will not interfere in advance of the creation of a nuisance where the injury is doubtful or contingent, and anticipated merely from the use to which the property is to be put.'" (quoting *Briggs v. City of Grand Rapids*, 261 Mich. 11, 245 N.W. 555, 556 (Mich. 1932) (internal citations omitted))); *Foster v. County of Genesee*, 329 Mich. 665, 46 N.W.2d 426, 429 (Mich. 1951) (stating that evidence that a "proposed use of property may constitute a possible threatened nuisance . . . does not entitle plaintiffs to an injunction" because "equity will not interfere in advance of creation of nuisance, where injury is doubtful or contingent, and anticipated merely from use to which property is to be put"); *Thompson-McCully Co.*, 608 N.W.2d at 537

("Equity will not interfere where injury from an anticipated nuisance is doubtful or contingent.").

The Michigan Supreme Court recognized in *Adkins v. Thomas Solvent Co.* that courts must balance several factors in awarding injunctive relief for anticipatory nuisances. See 440 Mich. 293, 487 N.W.2d 715, 725 (Mich. 1992) (acknowledging "that different considerations apply to the remedies appropriate, and that injunctive relief is sometimes available when a tort is merely threatened"); cf. *Hayes-Albion v. Kuberski*, 421 Mich. 170, 364 N.W.2d 609, 617-18 (Mich. 1984) (noting the importance of balancing factors for injunctions). The seriousness of the anticipated harm must be weighed against the likelihood that it will occur:

> The seriousness and imminence of the threat are . . . independent of each other, since a serious harm may be only remotely likely to materialize and a trivial harm may be quite imminent. Yet the two elements must be considered together . . . . The more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote.

Restatement (Second) of Torts § 933 cmt. b (1979); see also *Hayes-Albion*, 364 N.W.2d at 618 n.11 (citing Restatement (Second) of Torts § § 933, 936, and 942 for guidance in the analysis of a tort remedy). The law of anticipatory nuisance does not require absolute certainty where the harm is sufficiently serious.

"A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 213 Mich. App. 186, 540 N.W.2d 297, 300 (Mich. Ct. App. 1995). While Michigan law does not explicitly define what constitutes a "common right enjoyed by the general public," the language of *Cloverleaf Car Co.* mirrors the Restatement (Second) of Torts. See Restatement (Second) of Torts § 821B(1) (1979) ("A public nuisance is an unreasonable interference with a right common to the general public."). The Restatement (Second) of Torts defines a "public right" to be "one common to all members of the general public. It is collective in nature ...." *Id.* § 821B cmt. g.

Under Michigan law, "unreasonable interference" with a public right "includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Cloverleaf Car Co.* 540 N.W.2d at 300-301 (finding a public nuisance where gasoline spread from a tank system into groundwater). The right to be free from groundwater contamination and the right to be free from explosion and fire hazards, for example, have long been recognized as public rights under Michigan nuisance law.

The possibility that groundwater contamination could be a nuisance has been recognized by the Michigan courts at least since the late 1800s. See, e.g., *Upjohn v. Bd. of Health*, 46 Mich. 542, 9 N.W. 845, 845 (Mich. 1881) (considering whether the proposed use of adjacent land as a cemetery would "be detrimental to

the health of the people of the village; [would] corrupt the water of their wells and render it unfit for use, and for these reasons become a public nuisance"). The Michigan Supreme Court's statement that "the pollution of groundwater pollution may constitute a public or private nuisance," *Adkins*, 487 N.W.2d at 720 (citing Restatement (Second) of Torts § 832), recognizes that the right to be free from groundwater contamination is a public right.

The Michigan Supreme Court identified fire hazards as a nuisance in *Buckeye Union Fire Insurance Co. v. Michigan*: "the very nature of the nuisance . . . [of] a fire hazard" is that "sheer chance or an act of God (lightning) would convert the peril to the neighboring land into a destructive force." 383 Mich. 630, 178 N.W.2d 476, 480 (Mich. 1970). The Restatement (Second) of Torts also states that "a fire hazard to one adjoining landowner may be a public nuisance because of the danger of a conflagration." Restatement (Second) of Torts § 821B cmt. g (1979). Thus the right to be free from explosion and fire hazards is also a public right under Michigan nuisance law.

The "proscribed by law" definition of public nuisance in *Cloverleaf Car Co.*, 540 N.W.2d at 300, encapsulates a long line of Michigan decisions stating that an activity may be found to be a nuisance if it violates a law. See *Att'y Gen. ex rel. Mich. Bd. of Optometry v. Peterson*, 381 Mich. 445, 164 N.W.2d 43, 53 (Mich. 1969) ("At common law, acts in violation of law constitute a public nuisance.");[14] *Township of Garfield v. Young*, 348 Mich. 337, 82 N.W.2d 876, 878 (Mich. 1957) (suggesting that a statute could "denominate [an] activity a nuisance per se"); *Mich. State Chiropractic Ass'n v. Kelley*, 79 Mich. App. 789, 262 N.W.2d 676, 677 (Mich. Ct. App. 1977)

(stating that an "unlawful activity" is a public nuisance). However, other Michigan cases state that the bare violation of a statute is not enough to declare an activity to be a nuisance. See *Adkins*, 487 N.W.2d at 725 ("Defendant's business is a lawful business, and the fact that violations of the law may have occurred on the property does not make the conduct of the business a nuisance in fact."). "Factual support [is] required to prove nuisance; illegal conduct alone [is] not enough." *Id.* at 725 n.31; see also *Conway v. Gampel*, 235 Mich. 511, 209 N.W. 562, 563 (Mich. 1926) (stating that, even in a case where an activity is a nuisance per se, "a court of equity requires evidence of the fact of actual nuisance before it will enjoin"). *Adkins*, however, was decided on a theory of private nuisance in which no illegal conduct was alleged. See 487 N.W.2d at 721 ("The crux of plaintiff's complaint is that publicity concerning the contamination of ground water in the area (although concededly not their ground water) caused diminution in the value of the plaintiff's property."). *Conway* awarded injunctive relief to private landowners on grounds of both per se and factual nuisance. See 209 N.W. at 563 (noting that "if plaintiffs have established right to injunctive relief on [either allegations of illegal conduct or factual nuisance], the [lower court] must be affirmed."). But where a "statute enacted to preserve public health, safety and welfare" is violated, Michigan courts apply a per se rule. See, e.g., *Peterson*, 164 N.W.2d at 53 ("Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare.").

The public health and safety laws at issue in this case are contained in the Michigan Natural Resources

and Environmental Protection Act (NREPA). Mich. Comp. Laws Ann. § § 324.101-.99904 (West 1998).[15] In 1995 NREPA, as explained in the Preamble to section 324.101, effectively consolidated environmental protection statutes and created the Department of Environmental Quality, with jurisdiction over enforcement of pollution control statutes, § 324.99903. Part 201 of NREPA governs environmental cleanup. Part 31 addresses protection of Michigan's water resources.

Part 201 of NREPA: Part 201 of NREPA addresses environmental remediation generally. § § 324.20101-42. Section 324.20107a, in particular, requires that remedial measures be exercised with "due care . . . in a manner that protects public health and safety":

> (1) A person who owns or operates property that he or she has knowledge is a facility shall do all of the following with respect to hazardous substances at the facility:
>
> (a) Undertake measures as are necessary to prevent exacerbation of the existing contamination.
>
> (b) Exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety.

§ 324.20107a(1)(a)-(b) (emphasis added).

A "facility" is defined as "any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located." § 324.20101(1)(o). The court in *In re Approximately Forty Acres in Tallmadge Township v. Department of Natural Resources* found that the Michigan legislature intended to define "facility" broadly. 457 Mich. 885, 223 Mich. App. 454, 566 N.W.2d 652, 656 (Mich. Ct. App. 1997). In applying a broad definition of "facility" to a portion of NREPA that allowed a lien to be placed on a "facility," *Id.* at 654, the court stated that "if hazardous substances are located on a part of the property, a lien may be placed on the entire, legally described, parcel of land." *Id.* at 656. The court stated, however, that "courts must analyze each situation case by case". *Id.* On the basis of the following evidence, the court found an entire forty-acre parcel to be a "facility:"

> The hearing testimony indicated that the soil that had been contaminated had been moved to only one corner of the parcel. However, the testimony also indicated that there was no way to know if the subsurface soil was contaminated because the area is under landfill. Also, the ground water under twenty to thirty acres of the parcel was contaminated.

Id. at 656-57. Thus, an area larger than that which is contaminated may be a "facility."

An "owner" is defined as "a person who owns a facility." Mich. Comp. Laws Ann. § 324.20101(1)(z). An "operator" is defined as "a person who is in control of or responsible for the operation of a facility." § 324.20101(1)(y). In interpreting "operator," the Michigan Court of Appeals has stated that "in order for operator status to apply, a defendant must have had authority to control the operations or decisions involving the disposal of the hazardous substance, or assumed responsibility or control over the disposition of the hazardous substance." *Farm Bureau Mut. Ins. Co. v. Porter & Heckman, Inc.*, 220 Mich. App. 627, 560 N.W.2d 367, 378-79 (Mich. Ct. App. 1996). The court also stated that "absent either actual ownership or possession of a facility, a nexus must exist between the defendant and the facility by which the defendant has assumed responsibility for, or managed, or had authority to control, or controlled, the operations involving the disposition or handling of the hazardous substance." *Id.* at 379.

Michigan law defines a "hazardous substance" with reference to, *inter alia*, "hazardous waste as defined in part 111." Mich. Comp. Laws Ann. § 324.20101(1)(t)(iii). Part 111 defines "hazardous waste" as

> waste or a combination of waste and other discarded material including solid, liquid, semisolid, or contained gaseous material that because of its quantity, quality, concentration, or physical, chemical, or infectious characteristics . . . may pose a substantial present or potential hazard to

> human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed.

§ 324.11103(3).

"Exacerbation of . . . existing contamination" prohibited by § 324.20107a(1)(a) is defined as owner or operator activity causing either the migration of "existing contamination . . . beyond the boundaries of the property which is the source of the release at levels above cleanup criteria specified in section 20120a(1)(a) [the residential drinking water protection criteria],"[16] or "[a] change in facility conditions that increases response costs." § 324.20101(1)(n).

Section 324.20107a(1)(b) requires owners or operators to "exercise due care by undertaking response activities necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety." § 324.20107a(1)(b). "Response activity" is defined as "evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources." § 324.20101(1)(ee). "Remedial action," one of the many listed response activities, "includes, but is not limited to, cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment . . . or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to

the public health, safety, or welfare, or to the environment." § 324.20101(1)(cc).

Section 324.20107a is a public health, safety and welfare statute because "it is the purpose of [Part 201] to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare . . . from environmental contamination at facilities within the state." § 324.20102(c). Thus, "harm to the public is presumed to flow from the violation of [section 324.20107a,] a valid statute enacted to preserve public health, safety and welfare." *Peterson*, 164 N.W.2d at 53; see also *People v. McKendrick*, 468 N.W.2d 903, 909, 188 Mich. App. 128 (Mich. Ct. App. 1991) (quoting *Peterson*, 164 N.W.2d at 53, and noting that such a violation "is characterized as a public nuisance").

Part 31 of NREPA: Part 31 of NREPA addresses water resources protection. Mich. Comp. Laws Ann. § § 324.3101-33. At the time of the alleged taking, in May 1998, section 324.3109 prohibited the discharge of potentially injurious substances into the groundwater:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.
>
> . . . .
>
> (4) A violation of this section is prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this part may be abated

> according to law in an action brought by the attorney general in a court of competent jurisdiction.

§ 324.3109(1), (4); see also § 324.3101(y) ("'Waters of the state' means groundwaters . . . .").

Section 324.3109 provides that a violation of the section is "prima facie evidence of the existence of a public nuisance." § 324.3109(4). This means that once the statute has been violated, there is a rebuttable presumption that a public nuisance exists, which the party in violation has the burden of disproving. See *State Farm Fire & Cas. Co. v. Couvier*, 227 Mich. App. 271, 575 N.W.2d 331, 333 (Mich. Ct. App. 1998) (explaining the term "prima facie evidence" as "a rebuttable presumption that [the defendant] has the burden of disproving with evidence to the contrary," in a situation where a statute deemed an act "prima facie evidence of a violation" of that statute); see also *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Township*, 259 Mich. App. 315, 675 N.W.2d 271, 281 (Mich. Ct. App. 2003) ("Prima facie evidence is defined in Black's Law Dictionary (7th ed.) as 'evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.'").

Plaintiff argues that the force of Michigan nuisance law is blunted in this case because "mining is favored by Michigan public policy," Pl.'s Br. at 12, and that mining uncontaminated sand and gravel is not a nuisance per se, public nuisance, or nuisance in fact, *id.* at 15. Defendant responds that "the law is clear that even the carrying out of lawful activities can generate nuisance impacts." Def.'s Br. at 45. Defendant argues that, "in *Goldblatt v. Hempstead*, 369 U.S. 590, 591-93, 8 L. Ed.

2d 130, 82 S. Ct. 987 (1962), no takings liability accrued from the government's placing regulatory restrictions on the operation of a sand and gravel pit when those restrictions were designed to prevent nuisance-like consequences." Def.'s Br. at 45. Plaintiff replies that "the normal circumstances of an activity are entirely relevant as a background principle of property and nuisance law." Pl.'s Resp. Br. at 21-22. Plaintiff adds that several cases discussed by defendant "were all based on the determination that the mining in question would cause a nuisance under normal conditions[] [and] the courts determined that the mining uses when applied to the property as they naturally existed would cause a nuisance." Pl.'s Resp. Br. at 22 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987); *M&J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995); *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108 (1999)).

Lucas indicates that it is irrelevant to the present inquiry that mining is favored by Michigan public policy and that the business of sand and gravel mining is not a nuisance under Michigan law. In *Lucas*, the Court focused on the application of background principles to the intended use of property "in the circumstances in which the land is presently found." 505 U.S. at 1031 (emphasis added). Even if the general process of mining is not a nuisance under state law, factual circumstances may make mining harmful to others. See Restatement (Second) of Torts § 821A cmt. c (1979) (noting that "for a nuisance to exist, there must be harm to another or the invasion of an interest").

Michigan courts have long recognized the state's broad law police power to abate public nuisances:

> "The police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction and abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; [and] the destruction of decayed or unwholesome food . . . ."

Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N.W. 982, 985 (Mich. 1897) (quoting *Lawton v. Steele*, 152 U.S. 133, 136, 38 L. Ed. 385, 14 S. Ct. 499 (1894)). [17]

The background principles of Michigan nuisance law give the state police power to abate per se public nuisances caused by the violation of laws enacted to protect the public health, safety, and welfare. The court turns next to the application of these background principles to the facts before it.

2. Whether Michigan Law Could Abate Mining in the Area of Institutional Controls

Applying the standards set out in *Lucas* to the present situation, if the state government could have abated the particular use of property plaintiff intended under state law by physically excluding plaintiff from a portion of plaintiff's leasehold, then no compensation is required.

a. Whether Mining in the AIC Would Adversely Impact the Remediation

Defendant claims that an anticipatory nuisance would occur if plaintiff mined sand and gravel in the AIC because it would "impair the ability of the remedial action to remedy the contaminated groundwater." Def.'s Br. at 56. Part 201 of NREPA addresses environmental remediation. Mich. Comp. Laws Ann. § § 324.20101-42. Section 324.20107a, in particular, imposes a duty on the operator of a facility to exercise due care in remediation of existing contamination and proscribes activity that exacerbates existing contamination. See supra Part II.B.1 (discussing the remedial duty of due care, see § 324.20107a(1)(b), and the prohibition against exacerbating existing contamination, see § 324.20107a(2)). Defendant argues that, because plaintiff's mining in the AIC would exacerbate existing contamination in violation of section 324.20107a, plaintiff's mining in the AIC would be a public nuisance. Def.'s Br. at 76. Before examining whether plaintiff would have violated the statute by mining in the AIC, the court must first decide whether the AIC is a "facility" and whether plaintiff is one "who owns or operates . . . a facility." Mich. Comp. Laws Ann. § 324.20107a(1).

Plaintiff argues that "the uncontaminated sand and gravel within the AIC and outside the cap and not in the [Drum Area 1] soils is not a facility" because "an area without contamination is not a facility." Pl.'s Br. at 21-22. Defendant argues that the AIC is a facility and that plaintiff's construction of the term "facility" is too narrow. Def.'s Resp. Br. at 6-8. Defendant relies on *In re Approximately Forty Acres in Tallmadge Township*. Def.'s Br. at 7-8.

In accordance with the broad reading of "facility" given by the Michigan court in *In re Approximately*

Forty Acres, noted above in Part II.B.1, the court finds that the AIC, in its entirety, is a "facility." The AIC was developed in 1998 with the goal of enclosing an area necessary to construct the Landfill cap and serve as an area of "institutional controls." Tr. at 153:24-154:11 (Testimony of Dr. Campbell). "Institutional controls" are "controls [that] are placed on the property for specific reasons, typically to protect individuals from future exposures, along with ensuring that the property remains in a protective condition." Tr. at 314:5-12 (Testimony of Mr. Williams). After construction of the Landfill cap was completed, the fence enclosing the AIC was moved in 2003 to enclose a smaller area.[18] Tr. at 154:24-155:21 (Testimony of Dr. Campbell). The 2003 fence enclosed an area of land necessary to "protect the integrity of the capping system." Tr. at 155:9-11 (Testimony of Dr. Campbell).

The groundwater in the shallow aquifer beneath the AIC exceeds Michigan drinking water criteria for Contaminants of Concern (COCs).[19] See DX 461b (Map, 2000 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site); DX 461c (Map, 1998/1999 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site); DX 461f (Map, 1993 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site).[20] Because the current fence encloses the hazardous substances and an area necessary to protect the AIC and individuals who may be exposed to the hazardous substances within it, and because groundwater contamination exists beneath the AIC, the court finds that the AIC is a "facility." With respect to the area of land located between the 1998 and 2003 fence locations, the court finds that this area is not a facility.[21]

Having found that the AIC is a "facility," the court examines whether plaintiff is an "owner or operator" with "knowledge" that its property is a facility. See Mich. Comp. Laws Ann. § 324.20107a(1)(a)-(b) (requiring "[a] person who owns or operates a property that he or she has knowledge is a facility to prevent exacerbation of [] existing contamination," and imposing a duty to exercise "due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety"). Although neither party addressed plaintiff's status as an "owner or operator" with "knowledge" that its property is a "facility," cf. § 324.20107a(1)(a), the court nonetheless addresses these statutory requirements.

Substantial and uncontroverted evidence supports both plaintiff's knowledge of the "facility" status of the AIC and its role as an "operator" of the AIC. The court finds that plaintiff "operates" the facility because plaintiff "had authority to control . . . the operations involving the disposition or handling of the hazardous substance." *Farm Bureau Mut. Ins. Co.*, 560 N.W.2d at 379. The court bases this conclusion on the fact that plaintiff's Lease grants to plaintiff the leasehold area, including the AIC, for plaintiff's "exclusive use." See JX 1 (Lease ¶ 1). John R. Sand's understanding of the Lease is that its right to mine the property would preclude any other uses of the property, Tr. at 365:113 (Testimony of Mr. Evatz), an understanding that has been upheld in *County Transfer Stations, Inc. v. John R. Sand & Gravel Co.*, where the court found that John R. Sand had no obligation to accommodate County

Transfer Stations' business, which operated on the leasehold. 2003 Mich. App. LEXIS 2810, No. 236611, 2003 WL 22495581, at *3 (Mich. Ct. App. No v. 4, 2003). John R. Sand, likewise, had no obligation to accommodate the Landfill operation and could have halted the operations of the Landfill at any time. Its "authority to control . . . the operations involving the disposition or handling of the hazardous substance," *Farm Bureau Mut. Ins. Co.*, 560 N.W.2d at 379, renders plaintiff one who "operates" a facility. Furthermore, there can be no dispute that plaintiff "has knowledge [that the AIC] is a facility." Mich. Comp. Laws Ann. § 324.20107a(1). Plaintiff's cooperation with the Landfill operations and the continuous awareness by plaintiff's current president, Mr. Evatz, see Part II.A.4, supra, of events on the property since 1970, are sufficient to charge plaintiff with knowledge of its status as a "facility."

In order to determine whether mining in the AIC would violate John R. Sand's duties as the operator of a facility under Section 324.20107a to exercise due care in remediation and to avoid exacerbating existing contamination, the court reviews evidence regarding the "natural attenuation" remediation program in operation at the Metamora Landfill site.

Natural attenuation, or biodegredation, a process whereby natural processes in the environment "treat the chemicals and reduce their concentration," Tr. at 615:6-12 (Testimony of Mr. Reid), is occurring at the Metamora Landfill site. Tr. at 784:5-23 (Testimony of Dr. Vanderpool); JX 33 (Conceptual Site Model Report, supra, exec. summ. xii). The type of natural attenuation that is occurring at the Metamora Landfill site is biodegradation. Tr. at 784:5-23 (Testimony of Dr.

Vanderpool); JX 33 (Conceptual Site Model Report, supra, exec. summ. xii). In the biodegradation process, microorganisms break down contaminants either directly, by digesting the contaminant, or indirectly, by producing enzymes that break down contaminants, and, at the end of the process, a formerly hazardous chemical is no longer hazardous. Tr. at 784:5-786:15 (Testimony of Dr. Vanderpool).[22] One indicator that biodegradation is occurring at the Metamora Landfill site is the stability of the contaminant plume. Tr. at 801:5-802:19 (Testimony of Dr. Vanderpool). Dr. Vanderpool testified that, when she examined the data in 2000, contamination levels at particular shallow aquifer groundwater monitoring wells were going down and contamination levels decreased as the groundwater moved away from the Landfill. Tr. at 801:18-802:14.

Given the conditions of the site, the question is what would happen if John R. Sand were to mine in the AIC. Dr. Vanderpool testified to a number of hydrogeological effects that could be caused by excavating in the AIC. Tr. at 1326:22-1328:8.[23] Dr. Vanderpool also testified that excavating in the AIC would interrupt the biodegradation process by exposing the biodegradation microbes to oxygen. Tr. at 1329:21-1330:5. She explained that

> the microorganisms that . . . biodegrade the chlorinated hydrocarbons at this site[] don't like oxygen. . . . An excavation has the potential of exposing more . . . of the vadose zone to oxygen, putting that oxygen deeper down, wherever the bottom of the excavation is, so you have the potential of

> interrupting the biodegradation microbes that you're relying on.

Tr. at 1329:22-1330:5. If the biodegradation process is interrupted, the concentration of chemicals will not be reduced to the extent that they are currently being reduced.

COCs at levels exceeding Michigan drinking water criteria already exist in both the shallow and intermediate aquifers. JX 33 (Conceptual Site Model Report, supra, exec. summ. vii). "The extent of the groundwater criteria extends approximately 500 feet from the property boundary . . . . This extent has remained consistent over time . . ." *Id.* (Conceptual Site Model Report, supra, at 40). "The exceedance of [drinking water criteria in the intermediate aquifer] occurs at 1,000 feet downgradient of the Site . . . ." *Id.* (Conceptual Site Model Report, supra, at 52). One effect of biodegradation at the site is that groundwater contamination levels decreased as one moved away from the Landfill. Tr. at 801:4-802:16 (Testimony of Dr. Vanderpool). Digging inhibits the biodegradation process by introducing oxygen into the soil, thus increasing the volume of contaminants. Inhibiting the biodegradation process undoes the remedial effects put in place by the AIC.

Because the court finds that John R. Sand is an operator of a facility and that plaintiff's mining is "an activity undertaken by [a] person who . . . operates [a] property that he or she has knowledge is a facility, " Mich. Comp. Laws Ann. § 324.20107a(1), plaintiff has a duty to "exercise due care," § 324.20107a(1)(b), by taking "remedial action" in the "cleanup, removal, containment, isolation, destruction or treatment of a

hazardous substance released or threatened to be released into the environment," § 324.20101(1)(cc). Because plaintiff's mining would inhibit the "treatment of a hazardous substance released or threatened to be released" and therefore fail to "mitigate injury to the public health, safety, . . . welfare, or . . . environment," the court finds that plaintiff's mining in the AIC would violate section 324.20107a(1). See § 324.20101(1)(cc) (defining "remedial action").

Defendant argues that section 324.20107a is a public health, safety and welfare statute because it was "designed to protect the public health, safety, and welfare," Def.'s Br. at 76 & n.28, and that "under the doctrine set forth in the *Peterson* decision, a violation of that statute would be *presumed* to be a public nuisance." *Id.* at 76. The court agrees with defendant that section 324.20107a is a public health, safety and welfare statute because "it is the purpose of [Part 201] to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare . . . from environmental contamination at facilities within the state." Mich. Comp. Laws Ann. § 324.20102(c). Thus, "harm to the public is presumed to flow from the violation of [section 324.20107a,] a valid statute enacted to preserve public health, safety and welfare." *Peterson*, 164 N.W.2d at 53; see also *People v. McKendrick*, 188 Mich. App. 128, 468 N.W.2d 903, 909 (Mich. Ct. App. 1991) (quoting *Peterson*, 164 N.W.2d at 53, and noting that such a violation "is characterized as a public nuisance").

Because the court finds that mining in the AIC would violate section 342.20107a by adversely impacting the existing remediation, plaintiff's mining activity would be presumed to be a public nuisance.

Plaintiff was required to rebut the presumption of public harm but failed to do so. In particular, plaintiff presented no evidence that interruption of the biodegradation process would not occur. Thus, the court finds that plaintiff's mining in the AIC would cause a public nuisance by violating plaintiff's obligations under Part 201 of NREPA.

b. Whether Mining in the AIC Would Further Pollute Groundwater

Defendant alleges that plaintiff's mining in the AIC would "further pollute the already-contaminated groundwater." Def.'s Br. at 56. Defendant argues that it is "well established that groundwater pollution constitutes a nuisance," Def.'s Resp. Br. at 28 (citing *White Lake Improvement Ass'n v. City of Whitehall*, 177 N.W.2d 473, 481, 22 Mich. App. 262 (Mich. Ct. App. 1970)), and that "it is not necessary to prove that [groundwater] pollution will contaminate a [residential] well in order to establish a public nuisance," *id.* at 27. Defendant also states that "Adkins does not hold . . . that the state cannot act to abate a nuisance until there is proof that the contamination has reached a well," and that Adkins only addressed whether a private nuisance claim could be based solely on "'unfounded fear.'" Def.'s Br. at 28 (quoting Adkins, 487 N.W.2d at 721). Plaintiff argues that trial evidence demonstrated nothing more than "mining uncontaminated sand and gravel in the AIC may cause a risk that the contamination plume might move," and that this evidence was too "speculative" to support a finding of an anticipatory nuisance. Pl.'s Resp. Br. at 25.

The evidence at trial provided a wealth of hydrogeologic information about the Metamora Landfill

site. The land at the Metamora Landfill site consists of the following hydrogeologic units (starting at the surface of the ground and going down): vadose zone,[24] shallow aquifer, upper till aquitard, intermediate aquifer, lower till aquitard and bedrock aquifer. JX 33 (Conceptual Site Model Report, supra, exec. summ. v). Till lenses also exist at the Metamora Landfill site.[25] See Tr. at 1325:9-10 (Testimony of Dr. Vanderpool, stating that there are "definitely" till lenses at the Metamora Landfill site); see also JX 3, at D0185-86 (E.C. Jordan Co., Site Investigation Final Report 32-33 (Feb. 1986)), stating, in a section on regional hydrology, that "localized zones of perched groundwater exist where clay lenses are found at elevations above the water table"). A till lens, as opposed to a till layer, is a small piece of till that is not horizontally large. Tr. at 1319:22-25 (Testimony of Dr. Vanderpool). Till consists of compacted material, such as silt and clay, that is not very permeable. Tr. at 631:8-12 (Testimony of Mr. Reid). A till "can and usually [does] keep contamination from moving down to the next layer." Tr. at 1320:1314 (Testimony of Dr. Vanderpool); see also Tr. at 813:14-17 (Testimony of Dr. Vanderpool, stating that a till layer is "pretty impermeable").

COCs at levels exceeding Michigan drinking water criteria exist in both the shallow and intermediate aquifers beneath the Metamora Landfill site. JX 33 (Conceptual Site Model Report, supra, exec. summ. vii). "The extent of the groundwater plume [in the shallow aquifer] exceeding Michigan generic residential drinking water criteria extends approximately 500 feet from the property boundary . . . . This extent has remained consistent over time . . . ." *Id.* (Conceptual Site Model Report, supra, at 40). Contaminants have

migrated from the shallow aquifer to the intermediate aquifer through the upper till. *Id.* (Conceptual Site Model Report, supra, exec. summ. vii-viii). "The exceedance of [drinking water criteria in the intermediate aquifer] occurs at 1,000 feet downgradient of the Site . . . ." *Id.* (Conceptual Site Model Report, supra, at 52). Dr. Vanderpool offered two hypotheses regarding why the usually "impermeable" till layer was not able to stop the migration of contamination from the shallow aquifer to the intermediate aquifer: discontinuities (holes) within the upper till and fractures in the upper till. Tr. at 1317:4-1318:8, 1319:6-9.

There is currently no contamination in the bedrock aquifer of the Metamora Landfill site, possibly because "the presence of the Lower Till may be preventing migration to this aquifer." JX 33 (Conceptual Site Model Report, supra, exec. summ. viii). Dr. Vanderpool testified that, in the future, it is possible that contaminants will migrate to the bedrock aquifer. Tr. at 1318:15-18. Dr. Vanderpool testified that this possibility has not been quantified and that no studies have predicted when and under what circumstances contamination of the bedrock aquifer might occur, Tr. at 1336:21-1337:10, but she did explain how the migration of the contamination might occur: "Just as we have discontinuity in the upper till, we've also documented discontinuity in the lower till. It occurs further north, but it's there. And we still have the possibility that if the fracturing phenomenon is occurring, that too can occur in the lower till." Tr. at 1318:20-25. Additionally, the Conceptual Site Model Report states that "contamination was found within [thirty] feet of the bedrock aquifer and a downward gradient is suspected between the intermediate and

bedrock aquifers." JX 33 (Conceptual Site Model Report, supra, exec. summ. iii). The bedrock aquifer is the source of the residential water supply. Tr. at 1319:3-5 (Testimony of Dr. Vanderpool).

There are fourteen domestic water wells downgradient of the Metamora landfill site. JX 33 (Conceptual Site Model Report, supra, at 64). Twelve of the wells draw water from the bedrock aquifer and two draw water from the shallow aquifer. *Id.* The wells in the shallow aquifer are 2350 feet and 2500 feet downgradient of the Metamora Landfill site. *Id.*

Dr. Vanderpool stated that drilling and excavating could disturb the till lenses and create a new pathway for materials deposited on a till lens to reach the shallow aquifer. Tr. at 1327:8-25. The industrial history at the site indicates that it is possible that contamination is sitting on the till lenses at the Landfill site. Tr. at 1324:1-3 (Testimony of Dr. Vanderpool). Dr. Vanderpool testified that barrels containing chlorinated hydrocarbons in liquid form were dumped at the Landfill site. Tr. at 1321:2-12. Chlorinated hydrocarbons are dense, non-aqeous phase liquids (DNAPL), meaning that they are insoluble, resist going into the aqueous phase and are heavier than water and sink downward under gravity. Tr. at 1321:15-1323:4. When tne contents of the drums containing the chlorinated hydrocarbons spilled, some of the liquid stayed in the soils and was excavated, but evidence was not found that indicated where all of the fluids went. Tr. at 1321:9-14. Dr. Vanderpool testified that there is no evidence that DNAPLs have impacted the groundwater or that DNAPLs have moved through the till lenses. Tr. at 1322:5-9, 1323:25-1324:1. While Dr. Vanderpool could not say "absolutely" that DNAPLs at

the site exist, she stated that it was "possible" that DNAPLs are "probably" sitting on the till lenses. Tr. at 1324:1-6.

In contrast to the hypothesized existence of DNAPLs at the site, uncontradicted evidence confirms that contaminants are dissolved in the groundwater and move with the groundwater. Tr. at 1320:21-1321:1 (Testimony of Dr. Vanderpool). The contaminants that are dissolved in the groundwater can also rest, or perch, on a till lens. Cf. JX 3, at D0185-86 (E.C. Jordan Co., Site Investigation Final Report 32-33 (Feb. 1986)), stating, in a section on regional hydrology, that "localized zones of perched groundwater exist where clay lenses are found at elevations above the water table"). Dr. Vanderpool testified that she is not aware of any studies regarding the Metamora Landfill site that quantify the possibility of contamination stopping at a till lens. Tr. at 1339:18-1340:3.

Further, Dr. Vanderpool testified that the possibility that till lenses are retaining contaminants "could be good news, as long as [the contaminants] stay there and nobody bothers them[,] . . . [but] it could be bad news if, for some reason, the [contaminants] came off of them." Tr. at 1322:18-23. She stated that if a thick enough layer of contamination rests on a till lens, the contamination can come off the lens by penetrating through the till or by flowing off the lens. Tr. at 1323:1-5. In the case of DNAPLs, the flow of the contamination follows the geometry of the till layer, which can create a situation where the contamination flows in a direction different than that of the groundwater. Tr. at 1323:5-24. Dr. Vanderpool also testified that excavating could disturb the till lenses and create a new release, or

pathway, for materials deposited on a till lens to reach the shallow aquifer. Tr. at 1327:8-1328:1.

While it is possible that plaintiff's mining of the AIC after May 1998 could cause additional contaminants to reach the shallow and intermediate aquifers, the court does not find that significant harm from groundwater contamination is a "practically certain or strongly probable result or a natural or inevitable consequence" of plaintiff's mining in the AIC. *Falkner*, 117 N.W.2d at 128. The two residential wells in the shallow aquifer at 2350 and 2500 feet downgradient of the Metamora Landfill site are not contaminated. JX 33 (Conceptual Site Model Report, supra, at 64). Plaintiff's mining Lease has been in effect since 1969, see supra Part I (discussing the history of this case), during which time groundwater contamination has spread to 500 and 1000 feet from the AIC, JX 33 (Conceptual Site Model Report, supra, at 40, 52); it therefore appears "contingent" or "doubtful" that contamination will spread to residential wells 2350 and 2500 feet away were plaintiff to mine in the AIC. *Thompson-McCully Co.*, 608 N.W.2d at 537 ("Equity will not interfere where injury from an anticipated nuisance is doubtful or contingent."). While "the more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote," Restatement (Second) of Torts § 933 cmt. b, and while expansion of the contaminant plume and the possibility that it will reach residential wells is a very serious harm, the likelihood that it will occur appears to the court to be remote.

Defendant also argues that mining in the AIC would violate Part 31 of NREPA. Def.'s Br. at 70. Part 31 provides in part:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.

Mich. Comp. Laws Ann. § 324.3109(1)(a). Defendant argues that "because mining in the AIC would likely . . . result in the discharge of injurious substances into the groundwater, it is unlawful under . . . Part . . . 31." Def.'s Br. at 72. Defendant adds that, under section 324.3109(4), "it would be a *prima facie* public nuisance." Def.'s Br. at 77. Plaintiff did not respond to this argument in its post-trial briefing. The absence of argument from plaintiff appears to be based on plaintiff's contention that "defendant has abandoned its argument that Part 31 of NREPA . . . is a background principle of nuisance law. Defendant introduced no exhibits and provided no testimony that plaintiff's mining sand and gravel within the AIC would discharge any pollutants." Pl.'s Br. at 20 n.11.

The court agrees with the main point in plaintiff's argument that mining will not likely cause new discharges of pollutants. The court concludes, however, that the testimony concerning water pollution and the hydrogeology of the Metamora Landfill site strongly supports the court's conclusion above in Part II.B.2.a that mining would adversely impact the existing remediation of groundwater contamination. Precisely because the location of till lenses is uncertain, Tr. at 1337:18-1339:17 (Testimony of Dr. Vanderpool that the she is not aware of any study documenting the exact location of till lenses), and because the disturbance of

till lenses could create new pathways for pollution to spread, Tr. at 1327:8-1328:1 (Testimony of Dr. Vanderpool), plaintiff, as operator of a facility, could not mine without violating its duty to exercise due care to "clean[]up, remove, contain[], isolate, destroy, or treat[] . . . a hazardous substance released or threatened to be released into the environment." Mich. Comp. Laws Ann. § 324.20101(1)(cc) (emphasis added); see also § 324.20107a(1)(b) (articulating a facility operator's duty to exercise due care). The same facts that make it uncertain that excavating in any particular location will cause the discharge of injurious substances also make it uncertain that excavating in any particular location will not cause such a discharge and adversely impact the remediation effort.

c. Whether Mining in the AIC Would Cause a Nuisance Risk From Methane

Defendant argues that "mining within the AIC would create a public health risk because of the significant levels of methane emissions from the Metamora Landfill." Def.'s Br. at 75. To find a common law public nuisance with respect to methane, the court must determine that plaintiff's mining in the AIC would result in a significant harm that is a "practically certain or strongly probable result or a natural or inevitable consequence," *Falkner*, 117 N.W.2d at 128, of plaintiff's mining. In a case where, as here, the threatened hazard is serious, even catastrophic, "the less justification there is for taking the chances that are involved in pronouncing the harm too remote." Restatement (Second) of Torts § 933 cmt. b. The court must also find that plaintiff's mining would unreasonably interfere with "a common right enjoyed by the general public" and would either "significantly interfere[] with the

public's health, safety, peace, comfort, or convenience," or would be "proscribed by law." *Cloverleaf Car Co.*, 540 N.W.2d at 300.

In addition to its non-statutory nuisance argument, defendant also argues that "mining in the AIC . . . increases the risks of explosive conditions in violation of the duty to mitigate fire and explosion hazards under [§ 324.20107a(1)(b) of NREPA]." Def.'s Resp. Br. at 12. Because plaintiff is an operator of a facility, see Part II.B.2.a supra, and because section 324.20107a is a public health and safety statute, Mich. Comp. Laws Ann. § 324.20102(c), "harm to the public is presumed to flow from the violation of *[section 324.20107a,]* a valid statute enacted to preserve public health, safety and welfare." *Peterson*, 164 N.W.2d at 53; see also *People v. McKendrick*, 468 N.W.2d 903, 909 (Mich. Ct. App. 1991) (quoting *Peterson*, 164 N.W.2d at 53, and noting that such a violation "is characterized as a public nuisance"). The court now reviews the evidence regarding methane risks from the Metamora Landfill.

"When garbage degrades, it generates methane." Tr. at 232:1-2 (Testimony of Dr. Campbell); see also Tr. at 905:18-19 (Testimony of Mr. Henry, stating that "methane gas is formed in anaerobic conditions within [a] landfill"). Methane gas can travel laterally and follows the path of least resistance through the soil, so one does not generally know where methane gas is going to come up or where it might collect. Tr. at 1174:23-1175:2 (Testimony of Mr. Sygo); see also Tr. at 232:2-3 (Testimony of Dr. Campbell, stating that methane "migrates laterally"). Mr. Henry testified that there are two hazards posed by methane gas: explosion and asphyxiation. Tr. at 907:3-5; see also Tr. at 232:2 (Testimony of Dr. Campbell, stating that "methane gas

is an explosive gas"). Methane gas is "extremely flammable," Tr. at 907:7-9 (Testimony of Mr. Henry), so much so that "if you get a significant collection of methane . . . a spark could cause an ignition and an explosion," Tr. at 1174:13-15 (Testimony of Mr. Sygo).

A flammable gas has a range within which it will combust: "Below the lower explosive limit, the concentration of the flammable gas is not high enough to support combustion, and above the upper explosive limit, the concentration is so high . . . that it will not support combustion." Tr. at 911:2-8 (Testimony of Mr. Henry). The lower explosive limit for methane is five percent. Tr. at 315:18-20 (Testimony of Mr. Williams); 233:25-234:11 (Testimony of Dr. Campbell). Testimony did not indicate what the upper explosive limit of methane is, but testimony did indicate that fifty percent is "far above the upper explosive limit." Tr. at 911:13-14 (Testimony of Mr. Henry). Methane at concentration levels of concern "tends to collect in areas where you have structures, houses, any type of buildings, and in those situations, if you get a significant collection of methane . . . a spark could cause an ignition and an explosion." Tr. at 1174:9-15 (Testimony of Mr. Sygo); see also Tr. at 1174:15-22 (Testimony of Mr. Sygo describing the explosion of a private residence "as a result of methane migration into a residential area from an [adjacent] landfill"). With respect to asphyxiation, Mr. Henry testified that "if there's an underground structure, [methane gas] can actually displace the ambient air from there . . . [and] it could be an asphyxiation hazard . . . ." Tr. at 907:13-18.

The "major component" of the Metamora Landfill cap system remedy is "gas vents that vent any pressure from the methane buildup in the landfill." Tr. at 682:11-

19 (Testimony of Mr. Reid); see also Stip. Facts ¶ 16 (stating that the Landfill cap system remedy consists of, among other components, "installation, monitoring, and maintenance of a landfill gas venting system"). One of the reasons people are excluded from the AIC by a fence is because of the methane vents in the Landfill. Tr. at 315:6-13 (Testimony of Mr. Williams). Mr. Williams testified that if someone were to light a match or smoke a cigarette in the AIC, an explosion could occur if methane exceeded the lower explosive limit. Tr. at 315:13-17. Mr. Henry testified that, as far as he knows, the investigation regarding methane at the Metamora Landfill site has not been completed. Tr. at 907:24908 :1. Mr. Henry also testified that

> it was recognized visually that methane had been migrating from the landfill. On the eastern and northern perimeters of the landfill, there are mature trees that have died, undoubtedly as a result of methane migration displacing the oxygen from the soil that the trees' roots need in order to respire.

Tr. at 908:1-7; see also Tr. at 1177:2-8 (Testimony of Mr. Sygo, stating that methane gas "can cause . . . trees to die . . . and one of the indications of methane in some cases is looking at the vegetative growth in the immediate vicinity of the landfill to see if there's browning, and if there's . . . stress vegetation in those areas").

Michigan performed a soil gas survey on the Hughes property, which borders the northeastern corner of the Metamora Landfill site. Tr. at 908:21-24 (Testimony of

Mr. Henry). Michigan performed two borings-one twenty feet from the Landfill and the other two-hundred feet east of the Landfill site, and both between forty-five and fifty feet deep. Tr. at 909:1-6, 909:23-910:1 (Testimony of Mr. Henry). In the boring twenty feet from the Landfill, the state found the methane concentration to be "approximately fifty percent" by volume. Tr. at 910:6-10 (Testimony of Mr. Henry). In the boring two hundred feet from the Landfill site, the state found "normal soil gas compositions with no detectable concentrations of methane." Tr. at 910:14-17 (Testimony of Mr. Henry). There are also soil gas probes on the "southeast corner of the landfill, just to the northeast of the current retention pond, and . . . on the southwest corner of the landfill area, near the original access road to the landfill." Tr. at 923:22-924:2 (Testimony of Mr. Henry). Mr. Henry testified that he believes these probes show methane concentrations above the lower explosive limit, "about [ten] to [fifteen] percent by volume." Tr. at 924:5-8. These concentrations are above the lower explosive limit (five percent) for methane, see Tr. at 315:18-20 (Testimony of Mr. Williams), and appear to be within the upper explosive limit. Tr. at 911:13-14 (Testimony of Mr. Henry). Mr. Henry stated that it is "possible" that the methane gas migrating off the site is caused by the construction of the Landfill cap, but admitted that he did not know if the Landfill cap was the cause of the migration. Tr. at 924:10-16.

Mr. Sygo testified regarding the prohibition against excavating in an area where institutional controls are in place, noting that the presence of "institutional controls . . . might restrict the ability to excavate or to disturb any of the materials within an area that you have a

remedy that's in place . . . ." Tr. at 1177:21-1178:2. Mr. Sygo emphasized that "with a landfill situation, where you have a containment system that includes a cap, you certainly don't want somebody excavating in a manner that's going to allow you . . . to impact . . . the methane collection system, because that could . . . potentially exacerbate the situation and certainly impact on the long-term effectiveness of the remedy." Tr. at 1178:8-16. Mr. Sygo also testified that a spark could cause an explosion in the presence of a significant collection of methane, Tr. at 1174:9-15, and Mr. Henry testified that "in a[] confined space when [methane is] mixed with air, an ignition source can cause the situation to explode," Tr. at 907:18-19.

With respect to the common law nuisance risk of fire and explosion from methane gas, defendant must show that plaintiff's proposed use of the AIC-that is, mining sand and gravel-would result in a public nuisance that is a "practically certain or strongly probable result or a natural or inevitable consequence." *Falkner*, 117 N.W.2d at 128. One of the purposes of the AIC is to prevent the possibility that an ignition source would get too close to a methane vent. Tr. at 315:6-17 (Testimony of Mr. Williams). If plaintiff were to mine sand and gravel in the AIC, plaintiff would have to go inside the fenced AIC perimeter designed, among other purposes, to prevent methane explosions caused by people being too close to methane vents. An explosion on the Metamora Landfill site would be a very serious harm affecting adjacent landowners. As the Restatement notes, "the more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote." Restatement (Second) of Torts § 933 cmt. b.

The seriousness of the harm must be weighed against the likelihood that it will occur, and absolute certainty is not required where the harm is sufficiently serious. The court finds that a methane explosion at the Metamora Landfill site is a very "significant harm," *Thompson-McCully Co.*, 608 N.W.2d at 537, and given the seriousness, the harm is not so "doubtful or contingent," *Foster*, 46 N.W.2d at 429, as to be a risk that would be allowable under Michigan nuisance law.

The right to be free from explosion and fire hazards is one of the "common rights enjoyed by the general public." *Cloverleaf Car Co.*, 540 N.W.2d at 300; see also *Buckeye Union Fire Ins. Co.*, 178 N.W.2d at 480 (stating that "the very nature of the nuisance . . . [of] a fire hazard" is that "sheer chance or an act of God (lightning) would convert the peril to the neighboring land into a destructive force."). The Restatement (Second) of Torts states, with respect to public rights, that "a fire hazard to [even] one adjoining landowner may be a public nuisance because of the danger of a conflagration." Restatement (Second) of Torts § 821B cmt. g. Because the court finds it sufficiently likely that plaintiff's presence in the AIC would cause significant harm to adjoining landowners, the court finds that plaintiff's presence would also "unreasonably" and "significantly interfere[] with the public's health, safety, peace, comfort, or convenience." *Cloverleaf Car Co.*, 540 N.W.2d at 300.

The court also finds that plaintiff's presence in the AIC is "proscribed by law." *Cloverleaf Car Co.*, 540 N.W.2d at 300. The court found, above, that plaintiff is one who "operates . . . a facility." See supra Part II.B.2.a. The Metamora Landfill site contains a combination of waste that, if improperly treated, may

pose a substantial hazard to human health or the environment because of the danger of a methane explosion. Thus, the methane at the site is "hazardous waste" under section 324.11103(3) and a "hazardous substance" under section 324.20101(1)(t). Because methane gas is a hazardous substance, section 324.20107a(1)(b) requires plaintiff to exercise due care by taking actions necessary to protect the public health, safety, or welfare by mitigating fire and explosion hazards due to methane gas. The court finds that plaintiff's presence in the AIC, an area designed to mitigate the risk of explosion due to methane gas by barring unnecessary presence in the area, is prohibited *by section 324.20107a(1)(b)* and that plaintiff's presence in the AIC would violate that section.

The court has determined, see supra Part II.B.2.a, that section 324.20101a is a public health, safety and welfare statute and, as such, under *Peterson*, harm to the public is presumed to flow from its violation. See *Peterson*, 164 N.W.2d at 53 ("Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare."). Accordingly, plaintiff was required to present evidence that would rebut the presumption of public harm. Plaintiff has neither presented an argument nor pointed to evidence that would rebut the presumption that harm would flow from its violation of *section* 324.20107a(1)(b) with respect to methane. The court finds that if plaintiff were present in the AIC, plaintiff's presence would be "proscribed by law," *Cloverleaf Car Co.*, 540 N.W.2d at 300, and that plaintiff has not rebutted the presumption that "harm to the public [would] flow from the violation," *Peterson*, 164 N.W.2d

at 53. For the foregoing reasons, plaintiff's presence in the AIC would be a public nuisance.

d. Whether Michigan Could Have Abated Mining in the AIC Because of Public Nuisances

Having found that plaintiff's presence and mining in the AIC would create public nuisances, the court must determine whether the state could have abated those nuisances by prohibiting plaintiff from using the AIC. See *Lucas*, 505 U.S. at 1029 (stating that limitations on the use of property must "do no more than duplicate the result that could have been achieved . . . by adjacent landowners . . . under the state's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise").

Defendant relies on a number of NREPA provisions to argue that Michigan has the right to physically enter a property to abate a nuisance. See Defendant's Pretrial Memorandum of Contentions of Fact and Law at 49-51 (arguing that "physical ouster is allowed in order to abate certain nuisances" (emphasis omitted)). Plaintiff argues that "Michigan law requires that abatement of a nuisance be carefully tailored to avoid injury in legitimate business operations. Defendant has cited no Michigan case that holds that the government may permanently and physically occupy real property to abate a nuisance. Plaintiff's research discloses no such case." Pl.'s Br. at 30. Nor has the court found such a case or, indeed, any Michigan case closely analogous to this one.

The court has found that, if plaintiff were to mine in the AIC, plaintiff would cause common law nuisances by adversely impacting the remediation of methane

emissions and by creating a risk of a methane explosion. See supra Part II.B.2.c. These findings were based, in part, on the existing site conditions. "The remedy at the Metamora Landfill is designed to exist for a minimum of [thirty] years," Stip. Facts ¶ 22, and perhaps longer if, for example, in thirty years there remained hazardous material underneath the Landfill cap that would be venting methane, Tr. at 307:14-20 (Testimony of Mr. Williams). Plaintiff's Lease expires in 2019. See JX 1 (Lease ¶ 2, providing for a fifty-year term "from and after the 1st day of August 1969"). When plaintiff's Lease expires, the remedy at the Metamora Landfill site will still be in place. Plantiff's mining or presence in the AIC at any time during plaintiff's Lease term will cause the same nuisances.

The court can conceive of no remedy that would abate the methane nuisance and prevent an adverse impact on the existing remediation that would not also completely prohibit plaintiff from mining in the AIC. Thus, the "'destruction'" of plaintiff's right to mine in the AIC is "'essential to the public safety[] [and] health." See *Osborn*, 72 N.W. at 985 ("'The police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction and abatement by summary proceedings of whatever may be regarded as a public nuisance.'" (quoting *Lawton v. Steele*, 152 U.S. 133, 136, 38 L. Ed. 385, 14 S. Ct. 499 (1894))).

The court finds that the power to do what is required to remediate modern environmental hazards inheres in Michigan's police power just as much as the power to abate long-familiar common law public nuisances such as fire or explosion. An example in the *Lucas* case itself indicates that the background

principles exception applies to the abatement of modern hazards. The Court stated that "the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault," would not be entitled to compensation. 505 U.S. at 1029. This example demonstrates a situation where the government may discontinue a current use without providing compensation. The prevention of a use, as here, is closely analogous.

Because the power to abate a nuisance includes the power to prohibit a use of the property that would cause the nuisance, *Osborn*, 72 N.W. at 985, the court concludes that plaintiff could have been prevented under Michigan law from mining or being present in the AIC. The court finds that defendant, in preventing plaintiff from mining in the AIC, "[did] no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Lucas*, 505 U.S. at 1029.

III. Conclusion

Based on the evidence presented at trial and for the foregoing reasons, the court determines that defendant is not liable for a taking in this case, both because plaintiff lacks a compensable property interest, and because plaintiff's proposed mining would adversely impact the existing remediation of groundwater contamination and would constitute a failure to exercise due care to protect the public health, safety, and welfare. The court directs the Clerk of the Court to

enter judgment in favor of defendant as to all claims of John R. Sand & Gravel Co. No costs.

IT IS SO ORDERED.

EMILY C. HEWITT

Judge

Footnotes

n1 For additional background information, see *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 232-33 (2004) (granting defendant's cross-motion for summary judgment that the nuisance exception can be available as a defense in a physical takings case and denying the balance of defendant's cross-motion and plaintiff's motion for summary judgment); *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645, 647-48 (2004) (denying motion to intervene by group of entities who participated in the remediation of the Metamora Landfill site), *appeal docketed*, No. 04-5066 (Fed. Cir. Feb. 27, 2004); *John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182, 193 (2003) (denying "defendant's motion for summary judgment that plaintiff's complaint is time-barred . . ., except with respect to the monitoring wells not abandoned and still in operation").

n2 For convenient reference, the name and a description of each witness on whose testimony the court relies in this opinion follows:

> Dr. James R. Campbell is the president of Engineering Management and became the project manager for the Metamora Landfill site investigation and remediation in 1992. Tr. at 50:25-52:22 (Testimony of Dr. Campbell).

Lt. Gregory C. Eagle has been the supervisor of a unit of detectives specializing in investigating environmental offenses in the Office of Criminal Investigations at the Michigan Department of Environmental Quality (MDEQ) since 1987. Tr. at 703:16-704:13 (Testimony of Lt. Eagle). Lt. Eagle first became involved in the Metamora Landfill site in 1980 when he was asked to do some field work at the site because of its placement on a list of sites of potential or known contamination. Tr. at 705:9-22 (Testimony of Lt. Eagle).

Edward W. Evatz, Jr., is the current President of John R. Sand & Gravel Co. Tr. at 355:10-23 (Testimony of Mr. Evatz). He became president in 1992. Tr. at 355:24-356:1 (Testimony of Mr. Evatz). In 1969, when plaintiff leases the Metamora site, Mr. Evatz's father ran the sand and gravel operation at the site. Tr. at 361:1-9 (Testimony of Mr. Evatz). Mr. Evatz began working at the site in 1970. Tr. at 468:3-6 (Testimony of Mr. Evatz).

Mark A. Henry has been employed by the MDEQ and its predecessor, the Michigan Department of Natural Resources since 1980. Tr. at 858:15-859:8 (Testimony of Mr. Henry). He currently works as a Project Manager and the only environmental engineer in the Superfund Section of the Remediation and Redevelopment Division of MDEQ. Tr. at 862:23-24, 863:8, 865:3-5 (Testimony of Mr. Henry). The Superfund Section works with the United States Environmental Protection Agency (EPA) on environmental sites in Michigan that are on the National Priorities List, a list of the most contaminated sites in the

country. Tr. at 863:8-18 (Testimony of Mr. Henry). Mr. Henry first began working at the Metamora Landfill site in 1998. Tr. at 863:23-864:4 (Testimony of Mr. Henry).

James A Reid has hel various positions at Conestoga-Rovers & Associates (CRA) and is currently an Associate, which is the first management level below the vice president. Tr. at 587:1, 588:2-14, 589:7-14 (Testimony of Mr. Reid). Mr. Reid served as Project Engineer at the Metamora Landfill site from 1992-1993. Tr. at 589:4-6, 590:2-7 (Testimony of Mr. Reid). He then became a Project Coordinator at the site and is now the Project Manager. Tr. at 590:8-13 (Testimony of Mr. Reid).

James A. Sygo is currently the Deputy Director for the Waste and Hazardous Materials, Air Quality and Remediation and Redevelopment Divisions at the MDEQ. Tr. at 1142:15-23 (Testimony of Mr. Sygo). He has been working at the MDEQ for twenty years. Tr. at 1143:5-9 (Testimony of Mr. Sygo). Mr. Sygo became familiar with the Metamora Landfill site when he worked in the MDEQ Saginaw District Office. Tr. at 1155:18-23 (Testimony of Mr. Sygo). He visited the site on one occasion in 1984, and his division was involved in evaluation the characterization of the wastes that were being removed from the site. Tr. at 1155:23-1156:9 (Testimony of Mr. Sygo). Mr. Sygo was also involved in the evaluation of the possible placement of a permeable cap on the site. Tr. at 1156:4-6 (Testimony of Mr. Sygo).

Glenn Turchan is currently Executive Vice President at CRA, but he also functions as an engineer. Tr. at 1004:15, 1005:3-1006:2 (Testimony of Mr. Turchan). He specializes in environmental engineering and hydrogeology. Tr. at 1006:8-9 (Testimony of Mr. Turchan). Mr. Turchan first became involved with work at the Metamora Landfill site in 1990. Tr. at 1008:20-1009:1.

Thomas T. Williams is the current EPA Remedial Project Manager for the Metamora Landfill site. Tr. at 292:12-23, 293:19-23 (Testimony of Mr. Williams). He became the Remedial Project Manager of the site in 1998. Tr. at 294:10-12 (Testimony of Mr. Williams). The primary duty of a Remedial Project Manager is to supervise the cleanup of hazardous waste sites. Tr. at 292:24-293:6 (Testimony of Mr. Williams).

Dr. N. Luanne Vanderpool has been a geologist at the EPA since 1988. Tr. at 764:8. 765:3-5, 769:13-14 (Testimony of Dr. Vanderpool). She provides technical support to the Superfund program and specializes in hydrogeology, the study of processes related to groundwater. Tr. at 765:5-18 (Testimony of Dr. Vanderpool). Dr. Vanderpool became involved with the Metamora Landfill site at the request of Mr. Williams in 1999 when changing the groundwater remedy at the site was under construction. Tr. at 766:20-767:2, 770:11-771:8 (Testimony of Dr. Vanderpool).

n3 "The concept with the operable units was that if you had different media or different types of issues, you could split the project into different operable units." Tr. at 1017:9-12 (Testimony of Mr. Turchan).

n4 "Institutional controls" is a term used by the EPA to describe "controls [that] are placed on the property for specific reasons, typically to protect individuals from future exposures, along with ensuring that the property remains in a protective condition." Tr. at 314:5-12 (Testimony of Mr. Williams). The Metamora Landfill AIC was developed in 1998, before the Landfill cap design was completed. Tr. at 154:2-4 (Testimony of Dr. Campbell). The fence was designed to enclose the area needed to complete the construction of the Landfill cap and to be the area of institutional controls. Tr. at 154:4-11 (Testimony of Dr. Campbell).

n5 In a prior opinion in this case, the court decided that the Lucas "background principles" exception to takings liability applies to physical takings as well as to regulatory takings. See *John R. Sand II*, 60 Fed. Cl. at 235 ("The court finds that the better-reasoned position is that the background principles exception to takings liability discussed in *Lucas* can apply to both regulatory and physical takings cases."). "Because *Lucas* was a regulatory takings case, plaintiff and defendant disputed whether the 'background principles' exception to takings liability applied to physical takings as well as to regulatory takings." *Id.* (citation omitted); see also *Lucas*, 505 U.S. at 1009 (stating that plaintiff alleged a taking based on the state's passage of the Beachfront Management Act).

n6 In the court's prior summary judgment opinions, the court left open the question of when plaintiff's taking claim first accrued. See *John R. Sand II*, 60 Fed. Cl. at 241 (treating plaintiff's taking claim as having accrued on January 8, 1997 only "for the purpose of considering the pending motions"); *John R. Sand I*, 57 Fed. Cl. at 193 (finding plaintiff's claim not to be timebarred and

stating that "the court need not now decide exactly when plaintiff's claim first accrued").

n7 Plaintiff's denial of access to defendant's representatives on two occasions in 1996 led the EPA to issue an administrative access order in December of 1996, which prohibited plaintiff from interfering with the AIC. JX 45 (Administrative Order Directing Compliance with Request for Access in In re Metamora Landfill Site, No. 97-C-379 PP 4(n), 6(g) (EPA Dec. 18, 1996)). Despite this order, plaintiff continued to interfere with site access. See, e.g., DX 169 (Letter from Longo to Haynes of 1/29/97, at 1, stating that "due to your client's [John R. Sand's] refusal to allow access, the [Metamora Landfill Settling Potentially Responsible Party Group (MLSPG)] was forced to suspend activities at the site"). In 1997, defendant filed a complaint in the District Court for the Eastern District of Michigan, seeking an order in aid of access to the Metamora Landfill site. See JX 24 (United States v. John R. Sand & Gravel Co., No. 97-75497, at 1 (E.D. Mich. Mar. 23, 1998)). On March 23, 1998, the court granted the government and its representatives access to the Metamora Landfill site and authorized relocation of the AIC perimeter fencing. See JX 24 (United States v. John R. Sand & Gravel Co., No. 97-75497, at 2-3 (E.D. Mich. Mar. 23, 1998)). Relocation of the perimeter fence was completed in May of 1998. See JX 25 (Letter from Campbell to Haynes of 5/12/98, stating that "relocation of sections of the Site security fence has been completed").

n8 The Estate of Russell Parrish now owns the property. Stip. Facts ¶ 2.

n9 The court examines certain aspects of defendant's nuisance-related argument in the section addressing background principles of Michigan law. See infra Part II.B.

n10 The Michigan Department of Natural Resources is now called the Michigan Department of Environmental Quality. Tr. at 858:23-859:8 (Testimony of Mr. Henry).

n11 The Texaco case, on which defendant also relies, is a regulatory takings case in which the Supreme Court examined a takings challenge to an Indiana statute that provided that "a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." 454 U.S. at 518. In holding that the statute did not take private property without just compensation, the Court stated,

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required [the government] to compensate the owner for the consequences of his own neglect. We have concluded that the [government] may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of

> the property-and not the action of the [government]-that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking."

Id. at 530. Defendant focuses on the portion of the passage that states, "This Court has never required [the government] to compensate the owner for the consequences of his own neglect." Def.'s Br. at 40. The Supreme Court found that a property owner's "neglect" in failing to follow a constitutional regulatory scheme, which required an owner to use property or file a claim, caused the owner to lose its property interest. In the present case, there is no scheme or government action that divests plaintiff of its property interest. The court views *Texaco* as distinguishable from the present case and inapplicable to the facts before it.

n12 "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v. Thomas Solvent Co., 440* Mich. 293, 487 N.W.2d 715, 719 (Mich. 1992) (citing Restatement (Second) of Torts § 821D (1979)). The Michigan Supreme Court has stated that

> an actor is subject to liability for private nuisance . . . if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion

> results in significant harm[,] (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct.

Id. at 720 (citing Restatement (Second) of Torts § § 821D-F (1979)). This opinion focuses on the public nuisances alleged.

n13 The parties dispute whether the nuisance defendant alleges is an anticipatory nuisance, Pl.'s Br. at 17, or an ongoing nuisance, Def.'s Resp. Br. at 20. The only permitted use of the leased property is sand and gravel mining and related activities. JX 1 (Lease ¶ 1). As of May 1998, plaintiff was not mining in the area alleged to have been taken. Defendant's argument under Lucas must therefore be that plaintiff's proposed use would be a nuisance. The court thus applies an anticipatory nuisance standard.

n14 In the published form of this case, the dissenting opinion precedes the majority opinion. See *Peterson*, 164 N.W.2d at 44 (noting in the syllabus that Chief Justice Brennan authored the opinion, with a dissent by Justices Adams and Kavanagh, and beginning the opinion with Justice Adams' dissent). A subsequently published electronic version of the opinion, at 381 Mich. 445, 164 N.W.2d 43, 1969 Mich. LEXIS 139, corrects the opinion's format. The court draws attention to this anomaly to prevent confusion and to note that its opinion relies solely on the *Peterson* majority.

n15 The court uses the version and numbering of the law in effect in May of 1998, the date of the alleged taking, see supra Part II.A.1 (deciding that plaintiff's takings claim accrued in May 1998).

n16 "Residential drinking water protection criteria" is the "concentration [of contaminants] in soil which is protective of groundwater." Tr. at 626:15-19 (Testimony of Mr. Reid).

n17 The state's power to abate nuisances is limited in certain circumstances. If a nuisance arises out of the operation of a legitimate business, the nuisance should be abated, if possible, in a way that does not completely destroy the business. See, e.g., *Rohan v. Detroit Racing Ass'n*, 314 Mich. 326, 22 N.W.2d 433, 446 (Mich. 1946) ("'If a nuisance is private and arises out of a particular manner of operating a legitimate business, the court will do no more than point to the nuisance and decree adoption of methods calculated to eliminate injurious features.'"). The court observes that these limitations of police power are irrelevant to the case before it. The nuisances considered are not private; there is no allegation that an entire business is destroyed; and the nuisances would arise out of the ordinary operation of the business.

n18 The Landfill cap was completed in 2001, but the fence was not moved until 2003. Tr. at 156:3-158:6 (Testimony of Dr. Campbell). Testimony indicated that the initiation of this lawsuit led to the relocation of the fence to encompass a smaller area. Tr. at 154:11-18 (Testimony of Dr. Campbell). Testimony further indicated that, although this suit was filed in 2002, the group responsible for the cleanup activities did not

begin discussing the suit until 2003. Tr. at 157:23158 :6 (Testimony of Dr. Campbell).

n19 Contaminants of concern, or constituents of concern (COCs), are the contaminants that have been identified in the groundwater at the Metamora Landfill to be of the most concern. Tr. at 620:15-25 (Testimony of Mr. Reid). The following COCs have been found at the Metamora Landfill site: acetone; arsenic; benzene; 1,2-dichloroethane; cis-1,2-dichloroethene; ethylbenzene; 4-methyl-2-petanone; toluene; 1,1,2-trichloroethane; trichloroethene; and vinyl chloride. JX 33 (Conceptual Site Model Report, supra, tbl. 4.1). Both the EPA and the Michigan Department of Environmental Quality approved this list. Tr. at 621:13-14 (Testimony of Mr. Reid).

n20 Exhibits DX 461b, DX 461c and DX 461f map groundwater monitoring wells and highlight those where COCs exceeding Michigan drinking water criteria exist. The court bases its conclusion that the shallow aquifer beneath the AIC, as a whole, is contaminated on the comparison of the monitoring wells located to the south of the Landfill and to the north of the Landfill. Exhibits DX 461b, DX 461c and DX 461f all show that exceedances exist both to the south and to the north and northwest of the Landfill area. See, e.g., DX 461b (Map, 2000 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site, demonstrating that MW3698, MW37-98 and MW17S-98, all to the south of the Landfill, and MW-8, MW-16, MW31A-94 and MW24D-98, all to the north of the Landfill, had COCs exceeding Michigan drinking water criteria). Because "groundwater flow [in the shallow aquifer] is predominantly to the north and northwest,"

JX 33 (Conceptual Site Model Report, supra, at 62), the groundwater in the shallow aquifer between the contaminated southern wells and the contaminated northern wells is contaminated.

n21 The fact that the court finds this area not to be a facility does not affect the outcome of this case. The court ruled, above, that defendant is not liable for a taking in this case because plaintiff contributed to the problem defendant sought to resolve by acquiring its leasehold interest subject to the Landfill operation and by cooperating with the Landfill operation. See supra Part II.A.4 (discussing defendant's defense that plaintiff acquired its leasehold subject to the Landfill operation).

n22 The Conceptual Site Model Report provides a more technical description of biodegradation:

> Microbial biodegradation involves the utilization of carbon from an organic compound (the substrate) for microbial cell growth. As part of the biodegradation process, electrons are transferred from the organic substrate (electron donor) to an available electron acceptor. The transfer of electrons is defined as an oxidationreduction (redox) reaction. Energy derived from this transfer of electrons is utilized by soil microorganisms for cellular respiration.

JX 33 (Conceptual Site Model Report, supra, at 67-8).

n23 "Excavations and filling and drilling and mining would" pose a "risk to the remedy" implemented by the AIC by, for example, destabilizing the flow system or disturbing till lenses and creating new releases. Tr. at 1326:22-1327:16 (Testimony of Dr. Vanderpool).

n24 The "vadose zone is . . . an unsaturated zone that's the zone between the surface of the ground and the aquifer that is not saturated with water." Tr. at 628:11-14 (Testimony of Mr. Reid).

n25 Geomorphic evidence and the 1994 pre-design hydrologic investigation report support the conclusion that till lenses exist at the Metamora Landfill site. Tr. at 1324:8-1325:10 (Testimony of Dr. Vanderpool). The presence of surface water bodies in an area with deep groundwater, as exists in the Metamora Landfill area, indicates that till lenses exist because "to have a surface water body remain[] means you have to have something that holds the ground water, otherwise the surface water would just recharge down to the main ground water body." Tr. at 1324:9-20 (Testimony of Dr. Vanderpool). The pre-design hydrologic investigation drilled into the ground looking for saturated zones that form on the top of till lenses, called "perched water," and found them under and to the south of the Landfill. Tr. at 1324:22-1325:15 (Testimony of Dr. Vanderpool).

No. 02-509 L

UNITED STATES COURT OF FEDERAL CLAIMS

JOHN R. SAND AND GRAVEL CO.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

June 27, 2003, Filed

COUNSEL: Jeffrey K. Haynes, Bloomfield Hills, MI, for plaintiff. L. Rider Brice, III, Bloomfield Hills, MI, of counsel.

John S. Most, with whom was Thomas L. Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC, for defendant. Peter Felitti, Washington, DC, of counsel.

OPINION AND ORDER

This case is before the court on defendant's motion for judgment on the pleadings or, in the alternative, for summary judgment. Plaintiff (John R. Sand or plaintiff) seeks compensation for defendant's physical taking of plaintiff's property during the environmental remediation of an adjacent landfill site. See Complaint (Compl.) at 1, 913.[1]

I. Background[2]

In 1969, plaintiff entered into a 50-year lease for a 158-acre tract of land in Metamora Township, Lapeer County, Michigan, for the purpose of mining and marketing sand, stone, and gravel. See Compl. at 2; Def.'s Mot. at 3. The Metamora Landfill Site (Landfill), is a contaminated landfill located in the northern portion of the plaintiff's leasehold property (Property). See Compl. at 3; Def.'s Mot. at 3. [3]

The Michigan Department of Natural Resources (DNR) began investigations at the Landfill in 1981 following the discovery of drums containing hazardous waste. Def.'s Mot. at 3. In 1984, the Environmental Protection Agency (EPA) placed the Landfill on its "National Priority List" of hazardous waste sites, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § § 9601-9675 (1995). Def.'s PFUF ¶ 2.

In February 1986, EPA completed a Site Characterization Report for the Landfill and by August 1986, a Phased Feasibility Study was completed. See Compl. at 4. A Record of Decision (ROD) was signed by the Regional Administrator of EPA on September 1, 1986 (First ROD). *Id.* The First ROD contains remedial action plans for the south central portion of the Landfill (area 1) and the northwest portion of the Landfill (area 4). *Id.* By March 1989, EPA had completed a Remedial Investigation of the Landfill, which included the taking of soil samples and the installation of monitoring wells. *Id.* Some of this soil sampling and well installation occurred in areas of the Property that are not within the Landfill. *Id.*

A second ROD for final remedial action was issued in September 1990 (Second ROD). *Id.* The Second ROD

called for a cap over the northern portion of the Landfill (Landfill Cap), a pump and treat system for contaminated liquids, and deed restrictions over the Landfill. Pl.'s Opp. at 3. It did not, however, provide a metes and bounds description of the Landfill Cap, indicate when construction of the Landfill Cap would begin, or exclude plaintiff from any portion of its leasehold. Pl.'s Suppl. Br. at 3-4. EPA continued remedial activities during the following two years, including the construction of a concrete storage pad[4] to the east of the supply pond and the installation of additional monitoring wells on various portions of the Property. Def.'s Suppl. Br. at 2; see Pl.'s Suppl. Br. Exhibit (Ex.) 20.

In or about 1992, EPA and its agents mobilized to remove barrels and contaminated material from the Landfill. Compl. at 4. EPA demanded and acquired access to the Property in order to perform these removal operations. *Id.* EPA erected fences in plaintiff's plant area (Plant Area) during the winter of 1992-1993. *Id*; see Compl. Ex. 7 (map indicating fencing activities on the Property).[5] The impact of these fences on plaintiff's access to the Property and the legal consequences of that impact are at the center of this dispute. It is clear that the fences temporarily prevented plaintiff from operating its machinery and selling finished products to customers. Compl. at 4-5; Pl.'s Opp. at 5. Defendant argues that this exclusion was sufficiently permanent to effect the accrual of a taking, thereby time-barring plaintiff's present takings claim. Def.'s Mot. at 4-5; Def.'s Suppl. Br. at 7. However, following protests from plaintiff, EPA opened its gate to plaintiff and relocated the fences to areas outside plaintiff's Plant Area. Def.'s Mot. at 5;

Pl.'s Opp. Ex.17 P 6 (Declaration of Edward W. Evatz, Jr.) (Evatz Decl.). Plaintiff subsequently continued its mining and gravel operations on portions of the Property. Evatz Decl. ¶ 4.[6]

While plaintiff continued to use the Property, plaintiff's counsel wrote a series of letters to defendant from 1992-1994 asserting plaintiff's property rights and entitlement to "just compensation." See Def.'s Ex. 4-8. These letters had little effect on defendant's remedial actions on the Property. In February 1994, EPA installed an additional fence in plaintiff's Plant Area south of plaintiff's supply pond. Pl.'s Opp. at 5. This fence temporarily deprived plaintiff of access to its pond and stockpile areas. *Id.* EPA removed this fence in the summer of 1994, at which time plaintiff restarted its water supply well and used it continuously thereafter. Evatz Decl. ¶ 8.

On August 28, 1996, EPA amended the Second ROD (1996 Amendment). Compl. at 5. The 1996 Amendment provides that contaminated soil excavated from a portion of the Landfill be consolidated with other waste material from the Landfill and redeposited on the Landfill under the Landfill Cap. *Id.* The 1996 Amendment did not define the area to be covered by the Landfill Cap nor did it describe any related area to which access would be barred. Pl.'s Suppl. Br. at 5.

On December 18, 1996, EPA issued an Administrative Order (Administrative Order), No. 97-C-379, to plaintiff. Compl. at 6. The Administrative Order became effective on January 8, 1997, 21 days after its issuance. *Id.* It requires plaintiff to grant EPA and its agents, subcontractors, consultants, and representatives entry and access to all portions of the

Property for all activities that EPA asserts are necessary to complete actions required under the Consent Decree.[7] *Id.* (citing Compl. Ex. 2, Administrative Order ¶ 6.a). The Administrative Order forbids plaintiff from interfering with or impeding the selected remedy, including access roads, components of the groundwater treatment system, and fencing. *Id.* at 7 (citing Compl. Ex. 2, Administrative Order ¶ 6.d). It also defines by metes and bounds the area containing the Landfill Cap (the Area of Institutional Controls)[8] and prohibits plaintiff from interfering with the Area of Institutional Controls by excavating, grading, filling, drilling, drilling, mining, storage, disposal, or other construction or development. *Id.* (citing Ex. 2, Administrative Order ¶ 6.g); Pl.'s Suppl. Br. at 6. Plaintiff, under threat of a $ 25,000 a day penalty for noncompliance, agreed to comply with the Administrative Order and ceased all mining activity in the Area of Institutional Controls. Compl. at 7. At the time that EPA issued the Administrative Order, plaintiff was mining within the Area of Institutional Controls. *Id.*; Evatz Decl. ¶ 10.

Pursuant to the Administrative Order, EPA immediately began more extensive work at the Landfill and on the Property, including running hundreds of gravel trucks carrying fill for the Landfill Cap through plaintiff's Plant Area. Compl. at 7. On June 11, 1997, plaintiff's president and its counsel walked the Landfill and took pictures showing portions of the Area of Institutional Controls. Pl.'s Opp. at 7. Disputes arose among the parties relating to the plaintiff's compliance with the Administrative Order. Compl. at 8. On March 23, 1998, the United States District Court for the Eastern District of Michigan entered an order enjoining

plaintiff from interfering with entry by EPA, its contractors and representatives onto the Landfill or the Property. *Id.* A fence, begun on April 27 and completed on May 12, 1998, was installed around the Area of Institutional Controls, enclosing approximately 42 acres of plaintiff's 158-acre leasehold. See Pl.'s Opp. at 7; Pl.'s PFUF ¶ 31. This fence completely excluded plaintiff from the Area of Institutional Controls. Pl.'s PFUF ¶ 31 (citing Evatz Decl. ¶ 11).

Between 1998 and 2000, EPA placed 200,000 yards of fill dirt on the Area of Institutional Controls and constructed the landfill cap, together with a drainage system and perimeter road. PFUF P 32. EPA has abandoned several of the previously installed monitoring wells on the leased Property and in the Area of Institutional Controls. See Compl. at 9; Pl.'s Suppl. Br. at 7. Plaintiff's complaint was filed May 20, 2002.

II. Discussion

A. Standard of Review

A motion for judgment on the pleadings is treated as a motion for summary judgment under Rule 56 if "matters outside the pleadings are presented to and not excluded by the court." Rules of the United States Court of Federal Claims (RCFC) 12(c). Both parties included materials outside of the pleadings in their briefing. Therefore the court addresses defendant's alternative motion for summary judgment.

Summary judgment is warranted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48,

91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A fact that might significantly affect the outcome of the litigation is material. *Anderson*, 477 U.S. at 248. Disputes over facts that are not outcome determinative will not preclude the entry of summary judgment. *Id.* at 247-48.

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). The movant is also entitled to summary judgment if the non-movant fails to make a showing sufficient to establish an element of its case on which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefits of all favorable inferences and presumptions run. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), cert. denied, 474 U.S. 818, 88 L. Ed. 2d 52, 106 S. Ct. 64 (1985).

B. Statute of Limitations

Defendant argues that plaintiff's complaint should be dismissed as time-barred under the applicable statute of limitations because plaintiff's claim accrued, at the latest, in 1992, nearly ten years before the filing of plaintiff's complaint. See Def.'s Mot. at 1. Plaintiff maintains that defendant has incorrectly calculated the

date of accrual for plaintiff's claims and that plaintiff's complaint was filed well within the statute of limitation period. See Pl.'s Opp. at 9.

The applicable statute of limitations for filing suit in the Court of Federal Claims is six years. 28 U.S.C. § 2501 (1994). The statute provides that "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." *Id.* The six-year limitations period for actions against the United States "is a jurisdictional requirement attached by Congress" that must be strictly construed. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988); see also *Franconia Assocs. v. United States*, 240 F.3d 1358, 1362 (Fed. Cir. 2001)[9] (quoting *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990)) ("The six-year statute of limitations acts as 'an express limitation on the Tucker Act's waiver of sovereign immunity.'"); *Seldovia Native Ass'n v. United States*, 144 F.3d 769, 774 (Fed. Cir. 1998) (stating that "statute of limitations issues . . . are jurisdictional").

To defeat defendant's motion to dismiss this case, plaintiffs must establish "jurisdictional timeliness." *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)). Plaintiff cannot rely merely on the allegations in the complaint if jurisdiction is challenged. *Reynolds v. Army & Air Force Exch. Ser v.*, 846 F.2d 746, 747 (Fed. Cir. 1988). Because plaintiff bears the burden of proof by a preponderance of the evidence, it must offer relevant, competent evidence to show that it filed suit within six years of the accrual of

its claims. See 28 U.S.C. § 2501; *Reynolds*, 846 F.2d at 748; *Martinez v. United States*, 48 Fed. Cl. 851, 857 (2001).

1. Accrual of the Claim

Defendant contends that plaintiff's claim accrued no later than December 1992 because the critical events which gave rise to plaintiff's claim had all taken place by that time. See Def.'s Mot. at 1. Defendant argues that EPA's physical occupation of the Property, initial removal of hazardous materials, installation of several monitoring wells, and original fencing off of a large portion of the Property were "'all the events . . . which fix the alleged liability of the defendant.'" Def.'s Mot. at 10 (quoting *Hopland Band*, 855 F.2d at 1577).

Plaintiff responds that its physical takings claim did not accrue until its Property had been "'clearly and permanently taken.'" Pl.'s Opp. at 15 (quoting *Hornback v. United States*, 52 Fed. Cl. 374, 377 (2002) (internal citations omitted)). Plaintiff argues that this permanent taking did not occur until, at the earliest, January 1997 when the Administrative Order became effective, see Compl. at 6, or otherwise in April 1998 when EPA contractors installed the fence around the Area of Institutional Controls. Pl.'s Opp. at 23. Only then, plaintiff contends, did defendant totally exclude plaintiff from a portion of the Property and permanently physically occupy it for public use. *Id.* Before that, plaintiff was permitted access to the Property and in fact used the Area of Institutional Controls for mining purposes as late as December 1996. Compl. at 7; Evatz Decl. ¶ 10.

Determining whether plaintiff's takings claim is time-barred requires the court to ascertain when the

plaintiff's cause of action first accrued. A plaintiff has a "legal right to maintain his or her action" when the plaintiff's cause of action first accrues. *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (quoting 1 Calvin W. Corman, Limitations on Actions § 6.1, at 370-71 (1991)). "It is generally stated that a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band*, 855 F.2d at 1577. For physical takings cases, "the key date for accrual purposes is that date on which plaintiff's property 'has been clearly and permanently taken.'" *Hornback*, 52 Fed. Cl. at 377 (quoting *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000)). "During the time when it is uncertain whether the gradual process will result in a permanent taking, the plaintiff need not sue, but once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run." *Boling*, 220 F.3d at 1371. Thus, the court must determine when defendant had clearly and permanently physically taken plaintiff's property to identify the date of accrual.

The United States Supreme Court defined what constitutes a permanent physical taking or occupation in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432, 73 L. Ed. 2d 868, 102 S.Ct. 3164 (1982): "Property rights in a physical thing have been described as the rights 'to possess, use, and dispose of it.'" *Id.* at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945). "To the extent that the government permanently occupies physical property, it effectively

destroys each of these rights." *Id.* The Court defined the destruction of each of these three core property interests: (1) possession: "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space," *Id.*; (2) use: "the permanent physical occupation of property forever denies the owner [of] any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property," 458 U.S. at 436; and (3) disposal: "even though the owner may retain the bare legal right to dispose of the occupied space . . ., the permanent occupation of that space . . . will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.*; see also *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002). The Court distinguished permanent physical occupations (to which the *Loretto* rule applies) from temporary physical invasions of property by government (to which the *Loretto* rule does not apply):

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking . . . Temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

458 U.S. at 435 n.12.

This court has found that "a statute that regulates activities on land, such as CERCLA, may effect a per se taking where the regulation necessitates a permanent physical occupation of the subject property." *Scogin v. United States*, 33 Fed. Cl. 285, 290 (1995). However, "the execution of an administrative or court order, although purporting to allow physical occupation of private property, does not by itself constitute a taking of a compensable property right. *Id.* at 291 (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir. 1993)); *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991)). Instead, the focus must be on the actual character of the government action that allegedly physically interfered with the plaintiff's property rights. See Pl.'s Suppl. Br. at 12 (citing *Loretto, 458* U.S. at 426). If the government action, in addition to the order, has effectively extinguished the plaintiff's right to possess, use, and dispose of its property interest, then a permanent physical taking has occurred. *Loretto,* 458 U.S. at 435.

The United States Court of Appeals for the Federal Circuit held that the installation of monitoring wells by the EPA under the authority granted by CERCLA, as here, constituted a *per se* physical taking under *Loretto* of the area on which the wells were installed. *Hendler*, 952 F.2d at 1375; see also *McKay v. United States*, 199 F.3d 1376, 1381 (Fed. Cir. 1999). The *Hendler* decision "rested squarely upon the permanent nature of the wells and the regular government intrusions to monitor them." *Boise Cascade*, 296 F.3d at 1355. The court noted that "there is nothing 'temporary' about the wells the Government installed on plaintiff's property . . . . Years have passed since the Government installed the first wells. The wells are some 100 feet deep, lined with

plastic and stainless steel, and surrounded by gravel and cement . . . . These surveillance wells are at least as 'permanent' in this sense as the CATV equipment in *Loretto* . . . ." *Hendler*, 952 F.2d at 1376. "It is clear that the court . . . meant to focus attention on the *character* of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration." *Boise Cascade*, 296 F.3d at 1356. Indeed, the *Hendler* court found that "in this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term-what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute." *Hendler*, 952 F.2d at 1376. Thus, even if it did not permanently (in a temporal sense) occupy the property, the areas covered by the wells "involved total occupation" by the government, and therefore the only dispute concerned the amount of compensation to be paid to the displaced owner. *Boise Cascade*, 296 F.3d at 1357.

Drawing from the *Loretto* and *Hendler* analyses, the Federal Circuit has also addressed whether a permanent physical taking occurred despite the fact that the government allowed plaintiff access upon request to the allegedly taken premises. In *767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995), Sage Realty Corp. entered into leases with organizations from the Socialist Federal Republic of Yugoslavia ("SFRY"). *Id.* at 1576. Shortly after the leases were extended, war erupted in the SFRY and the United States formally acknowledged that the SFRY ceased to exist. *Id.* at 1577. Subsequently, President Bush issued an Executive Order which

"blocked" the properties of SFRY organizations in the United States, including the properties leased from Sage. *Id.* (citing Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (May 30, 1992)). Treasury agents inspected the premises and posted notices denying access for a short period of time. *Id.* at 1577-78. However, on the one occasion after these notices were posted in which Sage requested access to the premises, the government granted the request. *Id.* Sage filed suit in this court alleging a taking of its property, consisting of the benefits of its leases, for which it was entitled to just compensation under the Fifth Amendment. *Id.* This court held that the government "did not take physical possession of the subject premises and Sage was never physically denied access to the property on those occasions when it asked for access." *767 Third Ave. Assocs. v. United States*, 30 Fed. Cl. 216, 222 (1993), *aff'd*, 48 F.3d 1575 (Fed. Cir. 1995). The posting of signs therefore did not constitute a separate physical taking. See *Id.* The Federal Circuit affirmed, stating that "although the notice was backed by the force of law, it did not physically prevent Sage from entering the premises, and access was available when requested." *767 Third Ave. Assocs.*, 48 F.3d at 1583-84. Thus, "the government's actions did not rise to the level of a per se Loretto-type physical taking." *Id.*

In *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260 (D. Mass. 1998), the United States District Court for the District of Massachusetts held that a CERCLA access order sought by EPA did not effect a taking of the defendant's property. *Id.* at 1271. The court found that while EPA's remedial actions to clean up the hazardous waste dump may "work a taking of the defendant's property by something akin to

inverse condemnation," *Id.* at 1271, "if the government determines that it can perform the necessary remedial action without acquisition of the subject property, it need not 'take' the property." *Id.* The court added that only when the implementation of the remedy worked an actual taking of the defendant's property would the defendant then have a justiciable claim for an inverse condemnation. *Id.*

In this case, defendant has not demonstrated that plaintiff's property was "clearly and permanently" taken in 1992 such that its physical takings accrued at that time. See *Boling*, 220 F.3d at 1370. As in *767 Third Avenue*, when plaintiff here protested the erection of the original fences around portions of the Property, defendant immediately allowed plaintiff access to the Property and removed the fences shortly thereafter. Evatz Decl. ¶ 6. Indeed, Edward W. Evatz, president of John R. Sand, included in his Declaration his "Yardage Book" which shows the dates and numbers of yards of stone and sand removed from the Property during the years 1991-1995. See Evatz Decl. ¶ 4; Evatz Decl. Ex. A. Furthermore, he stated that "John R. Sand was mining sand and gravel north of the storage pad (in the area that eventually became known as 'the Area of Institutional Controls') during 1996" and until the Administrative Order was issued denying him access. Evatz Decl. ¶ 10. Finally, as late as June 11, 1997, Evatz toured the Landfill Area (within the Area of Institutional Controls) with his attorney, who took photographs. Evatz Decl. ¶ 11; Evatz Decl. Ex. B-F.

Defendant has therefore failed to meet its burden of showing an absence of any genuine issues of material fact. In particular, defendant has failed to demonstrate that it "destroyed" plaintiff's right to possess, use, or

dispose of the Property or the Area of Institutional Controls upon construction of fences in the winter of 1992-1993. See *Loretto*, 458 U.S. at 434-35. Instead, defendant merely alleges that "plaintiff was deprived to some extent of its 'right to possess, use, and dispose of' its property." Def.'s Reply at 8-9 (quoting *General Motors Corp.*, 323 U.S. at 378) (emphasis added). Being deprived "to some extent" of these rights is not sufficient to constitute a *Loretto*-type physical taking. Indeed, up until the Administrative Order of December 1996, plaintiff had the right to "possess the occupied space himself," *Loretto*, 458 U.S. at 435, and plaintiff certainly made extensive and valuable "use" of the property by continuing its mining and gravel operations on portions of the Property and in the Area of Institutional Controls. See Evatz Decl. ¶ 10; Evatz Decl. Ex. A. Although defendant may have taken away plaintiff's right to exclude, it is "the permanence and absolute exclusivity of a physical occupation" that distinguish physical takings from temporary limitations on the right to exclude. *Loretto*, 458 U.S. at 435 n.12 (emphasis added). "Such temporary limitations are subject to a more complex balancing process to determine whether they are a taking." *Id.* Defendant does not suggest that the court undertake such a balancing test, but merely alleges a permanent physical taking (and thus an accrual date) beginning in the winter of 1992-93 or earlier. Def. Mot. at 10. Based on plaintiff's relevant, competent evidence of continued access to and operations on the Area of Institutional Controls until late 1996, see *Reynolds*, 846 F.2d at 748, defendant has failed to meet its burden of demonstrating an absence of genuine issues of material fact on this matter.

With regard to areas of the Property covered by permanently installed and not abandoned monitoring wells, however, defendant has met its burden. Like the wells in Hendler, "there is nothing 'temporary'" about the permanent wells still in operation that were installed in or about 1989. *Hendler*, 952 F.2d at 1376. Indeed, plaintiff concedes that the monitoring wells identified as "10 series" and "MW-20" "permanently destroyed" some of its property rights under its lease. Pl.'s Supp. Br. at 24; see also Pl.'s Opp. Ex. 6 (map of Property showing location of wells).[10]

Plaintiff correctly points out that "the extent of the taking . . . would be limited to the area taken, e.g., the location of the well or drum pit and possibly an attached access easement." *Id.* (citing *Hendler*, 952 F.2d at 1378). A taking of those individual well areas does not, however, automatically extend or "bootstrap" to become a permanent physical taking of the entire Area of Institutional Controls. See Pl.'s Suppl. Br. at 26. Indeed, "*Hendler's* holding was unremarkable and quite narrow: it merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred." *Boise Cascade*, 296 F.3d at 1357. This per se physical taking is to be limited "to the extent of the occupation," and no more. *Loretto*, 458 U.S. 434-35. Thus, because defendant's "well installation and excavation activities did not permanently destroy any right John R. Sand had in the sand and gravel located nearby," Pl.'s Suppl. Br. at 26, and because plaintiff was able to walk on the land and carry on its mining activities within the Area

of Institutional Controls during the time after defendant claims a physical taking had accrued, *Id.* at 27; Evatz Decl. ¶ 10, defendant has failed to show an absence of any genuine issues of material fact except with regard to the permanent wells.

2. Knowledge of the Existence of the Claim

Defendant further argues that plaintiff's knowledge of the existence of a claim, as evidenced by its repeated letters threatening to exercise its legal rights, is proof that plaintiff was aware of "all the facts necessary to establish the liability of the United States for the alleged taking" in 1992-1994. Def.'s Mot. at 12 (quoting *Fallini v. United States*, 56 F.3d 1378, 1381 (Fed. Cir. 1995); see also Def.'s Reply at 9. Defendant relies on *Coastal Petroleum Co. v. United States*, 228 Ct. Cl. 864, 867 (1981), in which the Court of Claims stated that "once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run." Def.'s Mot. at 11.

Plaintiff responds that the letters written by its counsel from 1992-1994 are merely evidence that access issues were being negotiated between the parties during that time and do not show that defendant permanently physically occupied plaintiff's property. Pl.'s PFUF ¶ 19. Despite these letters, plaintiff continued to access and use the Property up until the 1996 Administrative Order. Pl.'s Opp. at 23; Evatz Decl. ¶ 10. Thus, plaintiff contends, its property was not "clearly and permanently taken" until this time. See Pl.'s Opp. at 23; *Hornback*, 52 Fed. Cl. at 377.

The United States Supreme Court has held that "the Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or

new niceties regarding 'causes of action' - when they are born, whether they proliferate, and when they die." *United States v. Dickinson*, 331 U.S. 745, 748, 91 L. Ed. 1789, 67 S. Ct. 1382 (1947). In deciding when a plaintiff's cause of action for a physical takings claim began to accrue, the Court found that even "assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him .... And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." *Id.* at 749. The Court reasoned that, if a plaintiff were required to bring suit as soon as it realized it had a potential physical takings claim, "other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain." *Id.* Thus, "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or premature litigation to ascertain the just compensation for what is really 'taken.'" *Id.*

The Federal Circuit has not interpreted *Dickinson* to require "that the damages from the alleged taking be complete and fully calculable before the cause of action accrues." *Fallini*, 56 F.3d at 1382. The Federal Circuit relied on *Delaware State College v. Ricks*, 449 U.S. 250, 258, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980), which found that the proper focus, for statute of limitations purposes, "is upon the time of the [defendant's] *acts*, not upon the time at which the *consequences* of the acts become the most painful." *Fallini*, 56 F.3d at 1383; see

also *Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249, 251, 143 Ct. Cl. 92 (Ct. Cl. 1958) (holding that *Dickinson* does not entitle the plaintiff to wait until damage is complete before filing suit). The Federal Circuit further clarified this matter in *Boling*, where the court explained that, properly understood, "stabilization" as discussed in *Dickinson* occurs when "the permanent nature of the taking is evident and the extent of the damage is reasonably foreseeable." 220 F.3d at 1371.

The *Dickinson* line of cases primarily involves takings occasioned by erosion that is traceable to flooding caused by the government. Because erosion caused by flooding is a gradual physical process, the plaintiff must wait to assert its claim until it knows whether the subjection to flooding is so substantial and frequent as to constitute a physical taking requiring just compensation. See, e.g., *Barnes v. United States*, 538 F.2d 865, 210 Ct. Cl. 467 (Ct. Cl. 1976); *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994); *Boling*, 220 F.3d 1365; see also *Banks v. United States*, 314 F.3d 1304 (Fed. Cir. 2003). Although this case is not factually on all fours with the erosion cases, their fundamental principles provide the court with guidance in determining whether plaintiff's claim accrued, as defendant asserts, in 1992 or earlier, simply because of plaintiff's knowledge of the existence of ~~a~~ potential claim at that time. See Def.'s Mot. at 12.

In making this assertion, defendant relies on several authorities. See Def.'s Mot. at 12 (quoting *Fallini*, 56 F.3d at 1380) ("Plaintiff's were 'cognizant of the facts underlying the alleged taking since long before they filed their complaint in the Court of Federal Claims,'" and thus their claim was time-barred.); Def.'s Mot. at 11

(quoting *Coastal Petroleum*, 228 Ct. Cl. at 867) ("'Once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run.'"); Def.'s Reply at 9 (citing *Alaska v. United States*, 32 Fed. Cl. 689 (1995).[11] Defendant's reliance on these cases is misplaced. In each case, the defendant's liability had already "stabilized" within the meaning of *Dickinson*. The "permanent nature" of the taking was evident and damages were reasonably foreseeable at the time the takings claim was found to accrue. See *Boling*, 220 F.3d at 1371.

In *Fallini*, ranchers contended that the government had taken their property by requiring them to provide water to wild horses whenever they gave water to their domestic livestock pursuant to the Wild Free-Roaming Horses and Burros Act. *Fallini*, 56 F.3d at 1380. However, the plaintiffs sued nine years after the enactment of the Act, and "nothing that happened in those later years had the legal effect of triggering, for the first time, the Fallinis' obligation to sue for the alleged takings that had occurred since the enactment of the . . . Act in 1971." *Fallini*, 56 F.3d at 1382. Thus, the plaintiff's claim was time-barred. *Id.*

Similarly, in *Coastal Petroleum*, the Court of Claims held that the plaintiff's claim began to accrue when a canal was constructed over land to which the plaintiff had leased the mineral rights, thereby preventing plaintiff's access to it and other limestone deposits in the surrounding lands. *Coastal Petroleum*, 228 Ct. Cl. at 868. The court found that "the injury to one's mineral rights caused by construction of a Canal over the land in which these rights are leased is obviously knowable." *Id.* at 867. Thus, the plaintiff's claim accrued when the

canal was completed and was time-barred when brought seven years later. *Id.* at 868.

Finally, in *Alaska v. United States*, this court held that the state of Alaska's takings claim based on the Export Administration Act of 1979, which prevented its export of crude oil transported over the Trans-Alaska Pipeline System (TAPS), was time-barred when brought in 1992. *Alaska*, 32 Fed. Cl. at 693-94. The court observed that "the export ban on TAPS oil has been completely stable since 1979. It has been in continuous effect and has not been substantively altered or modified . . . ." *Id.* at 700.

Unlike these cases, defendant's actions that allegedly took plaintiff's Property in this case were neither indisputably "stabilized" or of a "permanent nature" in 1992. Here, unlike *Fallini*, both parties' use of the Property changed subsequent to the erection of the original fences. Cf. *Fallini*, 56 F.3d at 1382. After being temporarily denied access to the Property, plaintiff demanded access and defendant granted it immediately. Evatz Decl. ¶ 6. Shortly thereafter the offending fences were moved. *Id.* Furthermore, unlike *Coastal Petroleum*, plaintiff here has not been shown to have been permanently denied any of its mineral rights, including access to sand or gravel in the Area of Institutional Controls, until the end of 1996. Evatz Decl. ¶ 10. Lastly, unlike *Alaska v. United States*, defendant's physical occupation of the Property and denial of plaintiff's access pursuant to the First ROD and the 1992-93 erection of fences was not "in continuous effect." Cf. *Alaska*, 32 Fed. Cl. at 700. Nor were defendant's activities without "substantive[] alterations or modifications" from time to time. Cf. *Id.*

Instead, defendant's actions which amount to an alleged physical taking are more analogous to the "continuing process of physical events" addressed in *Dickinson*. *Dickinson*, 331 U.S. at 749. EPA's activities on plaintiff's Property do not appear to the court to have been "stabilized" or "permanent in nature" for summary judgment purposes in 1992 or earlier. Fences were subsequently moved and removed. Evatz Decl. ¶ 6. The metes and bounds of the Landfill Cap were not yet defined. Pl.'s Suppl. Br. at 3. The Area of Institutional Controls had not been defined or implemented. *Id.* Profitable mining and gravel activities continued. Evatz Decl. ¶¶ 4, 10. Wells installed were later abandoned. Pl.'s Suppl. Br. at 7. Moreover, the Second ROD was subsequently amended in August of 1996 and was not implemented until the Administrative Order in December of 1996. Compl. at 5-6. Thus, although plaintiff appears to have known it had a potential takings claim, as shown by the letters written by its counsel in 1992-94, this is "not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him." *Dickinson*, 331 U.S. at 749.

Plaintiff has provided sufficient evidence that it continued its gravel and mining operations throughout the 1990s and into 1996. See Evatz Decl. ¶ 10; Evatz Decl. Ex. A. Until December 1996, when EPA issued the Administrative Order which finally defined the metes and bounds of the Area of Institutional Controls and prohibited plaintiff's access by threat of a $ 25,000 a day penalty for noncompliance, see Compl. at 6-7, plaintiff continuously (excepting only temporary impediments) had access to much of the Property and was able to make valuable use of it, including use of the

Area of Institutional Controls. Evatz Decl. ¶¶ 4, 8, 10. In these circumstances, the court cannot find that it was "evident" to plaintiff that the nature of defendant's taking was permanent in 1992-1996. See *Boling*, 220 F.3d at 1371; *Fallini*, 56 F.3d at 1382.

Nor can the court find that plaintiff's right to possess, use, and dispose of the Property within the Area of Institutional Controls had been destroyed before May 20, 1996, the date six years before plaintiff's complaint was filed. See *Loretto*, 458 U.S. at 434-35. Although the date of first accrual is a matter of law, see *Boling*, 220 F.3d at 1370-71, the court is mindful that takings jurisprudence is "uniquely fact intensive." *Ewald v. United States*, 14 Cl. Ct. 378, 382 (1988) (quoting *Juda v. United States*, 6 Cl. Ct. 441, 450 (1984)). Thus, "'denial of a taking claim on the basis of the defense of limitations is warranted only when the facts alleged demonstrate conclusively that such a decision is required as a matter of law.'" *Id.* The facts before the court at this juncture, except with respect to the permanent monitoring wells, do not constitute such a conclusive demonstration. The court need not now decide exactly when plaintiff's claim first accrued. The court finds, however, that defendant has failed to meet its burden of demonstrating the absence of any genuine issues of material fact entitling it to judgment that plaintiff's claim is time-barred.

III. Conclusion

For the foregoing reasons, defendant's motion for summary judgment that plaintiff's complaint is time-barred is DENIED, except with respect to the monitoring wells not abandoned and still in operation, as to which it is GRANTED. Accordingly, the court

LIFTS its stay of briefing on Plaintiff's Motion and Brief for Partial Summary Judgment on Liability (Plaintiff's Motion). The parties shall resume briefing on Plaintiff's Motion in accordance with the Rules of the Court of Federal Claims as if Plaintiff's Motion had been filed on the date of this Opinion and Order.

IT IS SO ORDERED.

EMILY C. HEWITT

Judge

Footnotesn1 The court has before it Defendant's Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment, and Memorandum in Support Thereof (Def.'s Mot.); Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings, or, in the Alternative, Motion for Summary Judgment (Pl.'s Opp.); Defendant's Reply in Support of its Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment (Def.'s Reply); Defendant's Proposed Findings of Uncontroverted Fact (Def.'s PFUF); Plaintiff's Responses to Defendant's Proposed Findings of Uncontroverted Fact (Pl.'s PFUF Resp.); Plaintiff's Additional Proposed Findings of Uncontroverted Fact (Pl.'s PFUF); Defendant's Responses to Plaintiff's Proposed Findings of Uncontroverted Fact (Def.'s PFUF Resp.); Defendant's Supplemental Briefing in Support of its Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment (Def.'s Suppl. Br.); and Plaintiff's Supplemental Brief on the Accrual of a Physical Taking Claim (Pl.'s Suppl. Br.).

n2 Facts cited to the filing of only one party do not appear to be in dispute.

n3 Plaintiff's Property is rectangular in shape and contains an access road running north-south slightly west of its center. See Pl.'s Opp. Exhibit (Ex.) 6 (detailed map of Property). Plaintiff's primary operations area is located in the center of the Property and just to the east of the access road. See Pl.'s Suppl. Br. Ex. 20 (map indicating operations area). The operations area consists of a garage, an electrical shed, a storage shed, a crushing and wash plant, a supply pond, customer access roads, and a surge pile. *Id.*; see also Pl.'s Opp. Ex. 6 (detailed map of Property); Transcript of Oral Argument (Tr.) Feb. 19, 2003, at 27-28; Compl. at 3-4. Plaintiff refers to this area as its "plant area." (Plant Area). Compl. at 4. The surge pile is on the southern end of the Plant Area. See Pl.'s Opp. Ex. 6. A sand and gravel pit is located to the southeast of the Plant Area. See *id.*; Pl.'s Suppl. Br. Ex. 20. Sand and gravel is moved northwest from the pit to the surge pile by a conveyor belt. Tr. at 29; Pl.'s Opp. Ex. 6. From there, another conveyor belt conveys the sand and gravel from the top of the surge pile north to the crushing and wash plant. *Id.*

n4 EPA used the storage pad to facilitate the excavation and removal of drums of hazardous waste and contaminated soil by storing them there for pickup. Def.'s Suppl. Br. at 7. EPA abandoned the storage pad in 1994, and since then plaintiff has made "full use" of it. Pl.'s Opp. Ex.17 ¶ 9 (Declaration of Edward W. Evatz, Jr.) (Evatz Decl.).

n5 The fences enclosed approximately sixty percent of the Property, including most of the Property lying east of the access road. See Compl. Ex. 7. They closed off all of the Plant Area as well as the sand and gravel pit. Evatz Decl. ¶ 6. The fences also temporarily prevented

plaintiff from accessing or engaging in mining activities in the area containing the Landfill. Def.'s Mot. at 5; (citing Def.'s Mot. Ex. 3 ¶ 2 (Declaration Linda M. Nachowicz) (Nachowicz Decl.)); see also Compl. Ex. 7.

n6 On March 17, 1993, EPA and a group of defendants (Settling Defendants) entered into a consent decree (Consent Decree) in the action *United States v. BASF-Inmont Corp.*, 819 F. Supp. 601 (E.D. Mich. 1993). See Compl. at 5. Plaintiff is not a party to the Consent Decree. *Id.* In the Consent Decree, Settling Defendants agreed to perform the remediation of the Landfill. Compl. at 5.

n7 See supra note 6.

n8 The Area of Institutional Controls is located primarily in the northeastern portion of the Property. See Compl. Ex. 8.

n9This decision was reversed in part on other grounds by *Franconia Assocs. v. United States*, 536 U.S. 129, 153 L. Ed. 2d 132, 122 S. Ct. 1993 (2002).

n10 Plaintiff does argue, however, that the "17 series" of monitoring wells that were originally installed within the Landfill and subsequently removed or abandoned "cannot be seen to constitute a permanent taking" because they no longer affect plaintiff's exercise of its property rights. Pl.'s Suppl. Br. at 24. Thus, plaintiff contends, its takings claim for any space temporarily occupied by these abandoned wells has not yet accrued. See *id.* at 30. However, "all takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." *Hendler*, 952

F.2d at 1376. It appears to the court that, under *Hendler*, a taking by the installation of a well would ordinarily occur immediately upon the well's construction and resulting exclusion of a plaintiff. See *Id.* Accordingly, six years after this stabilized and total destruction of a plaintiff's property rights, plaintiff's physical takings claim for that well area is time-barred. Thus, regardless of whether a well has been or will be eventually abandoned or removed, if plaintiff's claim is brought more than six years after the well's construction, *Hendler* instructs that the well installation constituted a physical taking that has accrued and is time-barred. See *Id.*; see also *Alliance of Descendants of Tex. v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (holding that a claim under the *Fifth Amendment* accrues when the taking action occurs). That is not to say, however, that an area previously taken by a now-abandoned monitoring well could not be taken again by the construction of the Landfill Cap over the area in which the abandoned monitoring well once existed. Cf. *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994).

n11 In *Alaska v. United States*, the court stated that "there is a critical difference between knowing of a potential claim and being certain that one will prevail on the merits at trial. The former, and not the latter, is sufficient to start the running of the statute of limitations." *Alaska*, 32 Fed. Cl. at 701.

05-5033

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN R. SAND & GRAVEL COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

November 30, 2006, Decided

November 30, 2006, Filed

ORDER

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 7, 2006.

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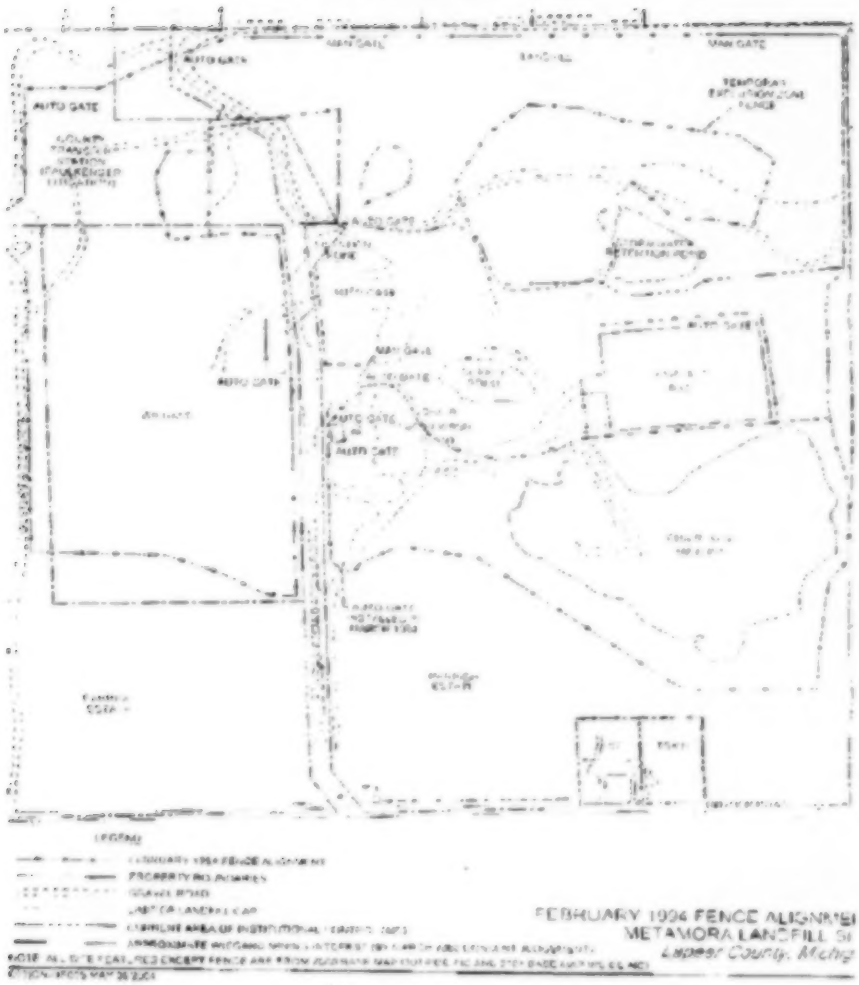
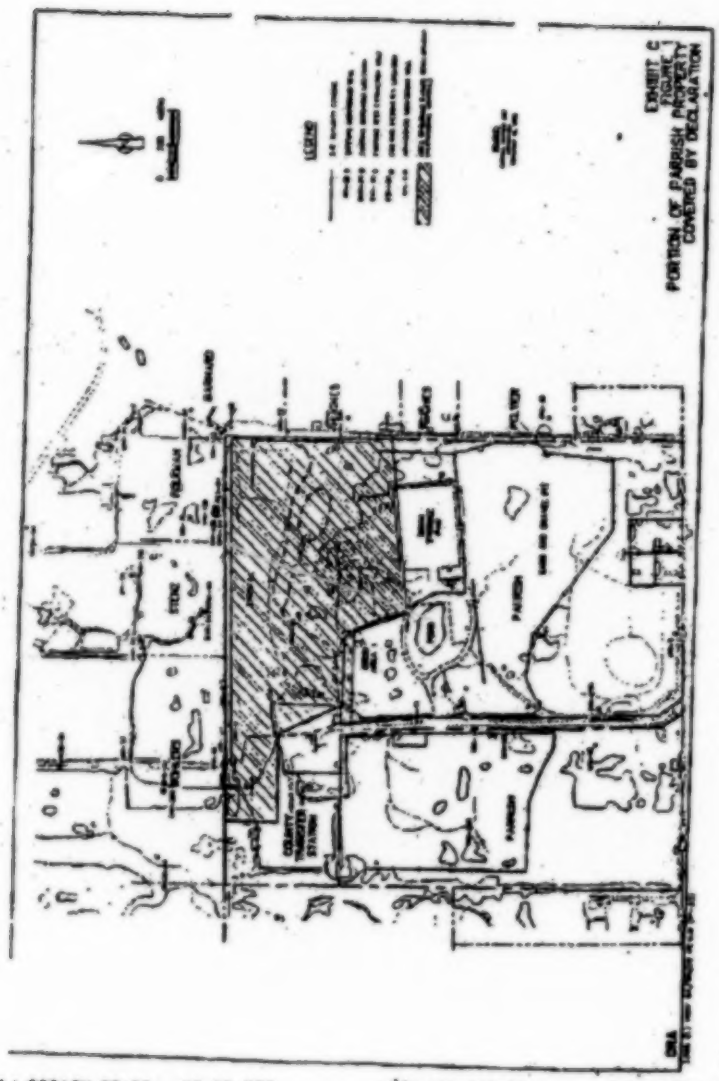
Appendix A





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